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No. 06-7949

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BRIAN MICHAEL GALL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

JOINT APPENDIX: VOLUME I OF II

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PETITION FOR CERTIORARI FILED NOVEMBER 22, 2006
CERTIORARI GRANTED JUNE 11, 2007

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
(CENTRAL)

[Filed 4/28/2004]

Case No. 4:04-cr-00116-RP-RAW-5

UNITED STATES OF AMERICA,
Plaintiff,

v.

BRIAN MICHAEL GALL,
Defendant.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
04/28/2004	1	INDICTMENT by USA Counts filed against Antonio Fernandez Perez (1) count(s) 1, Reynaldo Cortez (2) count(s) 1, Jesse Lee Crawford (3) count(s) 1, Brooks Thomas Robinson (4) count(s) 1, Brian Michael Gall (5) count(s), 1, Theodore Joseph Sauerberg (6) count(s) 1, Corey Alan Coleman (7) count(s) 1, Jarod James Yoder (8) count(s) 1 (sd) (Entered: 04/29/2004)
		* * * *
04/29/2004		ARREST Warrant issued for Antonio Fernandez Perez, Reynaldo Cortez Sr, Jesse Lee Crawford, Brooks Thomas Robinson, Brian Michael Gall, Theodore Joseph Sauerberg, Corey Alan Coleman, Jarod James Yoder (sd) (Entered: 04/29/2004)

DATE	NO.	PROCEEDINGS
06/23/2004	34	CLERK'S COURT MINUTES: before Magistrate Judge Ross A. Walters dft Brian Michael Gall arraigned; not guilty to Ct. 1 plea accepted; Attorney Marc Milavitz present; defendant released on bond pending trial. () Crt Rptr: Taped (sd) (Entered: 06/23/2004)
06/23/2004	35	ORDER setting conditions of release for Brian Michael Gall by Magistrate Judge Ross A. Walters ; OR bond (sd) (Entered: 06/23/2004)
		* * * *
07/01/2004	41	ARREST Warrant returned executed as to defendant Brian Michael Gall ; defendant arrested on 6/23/04 (sd) (Entered: 07/01/2004)
		* * * *
03/02/2005	175	Minute Entry for proceeding held before Judge Robert W. Pratt: Change of Plea Hearing as to Brian Michael Gall held on 3/2/2005. Begin 10:00 a.m., end 10:45 a.m. Sentencing set for 5/27/2005 at 1:30 p.m. in Room 265 – 2nd Floor before Judge Robert W. Pratt. (Court Reporter Kelli Mulcahy.) (jhm) Modified on 3/2/2005 to time of hearing. (jhm,). (Entered: 03/02/2005)
		* * * *
03/02/2005	177	PLEA AGREEMENT as to Brian Michael Gall (jhm) (Entered: 03/02/2005)
		* * * *

DATE	NO.	PROCEEDINGS
05/23/2005	193	SENTENCING MEMORANDUM/BRIEF by Brian Michael Gall (rmj) (Entered: 05/23/2005)
05/25/2005	194	*SEALED* MOTION for Downward Departure by Brian Michael Gall. (rmj) (Entered: 05/25/2005)
		* * * *
05/27/2005	198	Minute Entry for proceedings held before Judge Robert W. Pratt: Sentencing held on 5/27/2005 for Brian Michael Gall (5). Begin: 1:30 p.m., end: 3:00 p.m. As to Count 1, Defendant sentenced to a 36 month term of probation. (Court Reporter Kelli Mulcahy.) (jhm). Please see additional attachment, corrected minutes, added on 5/31/2005 (jhm). Modified on 5/31/2005 to provide notice of corrected minutes attachment. (jhm). (Entered: 05/31/2005)
05/27/2005	199	JUDGMENT as to Brian Michael Gall (5), Count(s) 1, Defendant sentenced to a 36 month term of probation. Entered by Robert W. Pratt on 5/27/2005. OJ No. 323:26 (jhm). (Entered: 05/31/2005)
		* * * *
06/02/2005	201	SENTENCING MEMORANDUM as to Brian Michael Gall . Entered by Robert W. Pratt on 6/2/2005. (mlm,) (Entered: 06/02/2005)
		* * * *

DATE	NO.	PROCEEDINGS
06/06/2005	203	SATISFACTION OF MONETARY IMPOSITION OF JUDGMENT as to Brian Michael Gall *CVF Assessment* regarding Judgment 199 (Hayward, Gary) (Entered: 06/06/2005)
06/08/2005	204	TRANSCRIPT of Proceedings as to Brian Michael Gall re 198 Sentencing, held on 5/27/05 before Judge Robert W Pratt. Court Reporter: Kelli M Mulcahy, Page No(s): 1-57. THIS DOCUMENT IS NOT PART OF THE ELECTRONIC CASE. ORIGINAL LOCATED IN THE CLERK'S OFFICE. (gk,) (Entered: 06/09/2005)
		* * * *
06/21/2005	210	PRESENTENCE INVESTIGATION REPORT (Sealed) as to Brian Michael Gall. (jhm). (Entered: 06/21/2005)
		* * * *
06/24/2005	212	NOTICE OF APPEAL by USA as to Brian Michael Gall re 199 Judgment. (Griess, Jason) (Entered: 06/24/2005)
		* * * *

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[Filed 7/16/2005]

Docket No. 05-3001

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

BRIAN MICHAEL GALL,
Defendant-Appellee.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
07/19/2005	Criminal Case Docketed Dist. Ct. Office: Des Moines
	* * * *
09/29/2005	BRIEF FILED—Brief of Appellant-USA in 05-3001 7,717 words w/addendum 10 copies—w/service 9/28/05 w/diskette. [05-3001] [1958270]
	* * * *
11/18/2005	BRIEF FILED—Brief of Appellee—Brian Michael Gall in 05-3001. 5,266 words w/addendum—10 copies—w/service 11/18/05. w/CDROM [05-3001] [1977697]
	* * * *

DATE	PROCEEDINGS
02/14/2006	ARGUED AND SUBMITTED IN ST. LOUIS TO JUDGES James B. Loken, Chief Circuit Judge, Pasco M. Bowman, Circuit Judge, Lavenski R. Smith, Circuit Judge. Jason T. Griess for Appellant USA in 05-3001. Marc Milavitz for Appellee Brian Michael Gall in 05-3001. Rebuttal by: Jason T. Griess. RECORDED. [05-3001]
05/12/2006	THE COURT: James B. Loken, Pasco M. Bowman, Lavenski R. Smith. OPINION FILED by Lavenski R. Smith, Authoring Judge PUBLISHED. [05-3001] [2044387]
05/12/2006	JUDGMENT: James B. Loken, Pasco M. Bowman, Lavenski R. Smith. The judgment of the lower court is REVERSED and REMANDED in accordance with the opinion. [05-3001] [2044387]
05/26/2006	PETITION for REHEARING with petition for rehearing en banc. Filed by Appellee Brian Michael Gall in 05-3001, w/service 5/24/06., TO COURT [05-3001]
07/07/2006	JUDGE ORDER: denying petition for Rehearing with petition for rehearing en banc [2050230-1] filed by Brian Michael Gall. Petition for panel Rehearing is also denied. [05-3001] [2064684] —Published Order., DENIED
08/02/2006	MANDATE ISSUED [05-3001]

* * * *

DATE	PROCEEDINGS
12/01/2006	U.S. Supreme Court notice filed. Petition for writ of certiorari filed in the Supreme Court on November 22, 2006. Supreme Ct. Case No.: 06-7949 [05-3001] [2119147]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

Criminal No. 04-

INDICTMENT

T. 21 U.S.C. § 846, T. 21 U.S.C. § 841(a)(1),
T. 21 U.S.C. § 841(b)(1)(A)(ii)(II),
T. 21 U.S.C. § 841(b)(1)(C), T. 21 U.S.C. § 841(b)(1)(D),
T. 21 U.S.C. § 853(a)(1) and (2),

UNITED STATES OF AMERICA,
Plaintiff,

v.

ANTONIO FERNANDEZ PEREZ, REYNALDO CORTEZ, SR., JESSE LEE CRAWFORD, BROOKS THOMAS ROBINSON, BRIAN MICHAEL GALL, THEODORE JOSEPH SAUERBERG, COREY ALAN COLEMAN, and JAROD JAMES YODER,
Defendants.

THE GRAND JURY CHARGES:

COUNT 1

(Conspiracy to Distribute Drugs)

From a date unknown to the grand jury, but beginning by on or about May of 1996, and continuing to on or about October 30, 2002, in and about the Southern District of Iowa and elsewhere, the defendants, ANTONIO FERNANDEZ PEREZ, REYNALDO CORTEZ, SR., JESSE CRAWFORD, BROOKS ROBINSON, BRIAN MICHAEL GALL, THEODORE JOSEPH SAUERBERG, COREY ALAN COLEMAN, and JAROD JAMES YODER, did knowingly and intentionally conspire with each other and with other persons,

known and unknown to the Grand Jury, to knowingly distribute controlled substances, that is (1) a mixture and substance containing methylenedioxymethamphetamine (MDMA), a Schedule I controlled substance; and (2) at least 5 kilograms of a mixture and substance containing cocaine, a Schedule II controlled substance; and (3) a mixture and substance containing marijuana, a Schedule I controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

This is a violation of Title 21, United States Code, Sections 846 and 841(b)(1)(A)(ii)(II), 841(b)(1)(C), and 841(b)(1)(D).

THE GRAND JURY FURTHER CHARGES:

ALLEGATION OF FORFEITURE

In committing the felony offense alleged in Count 1 of this indictment, punishable by imprisonment of more than one year, REYNALDO CORTEZ, SR.:

(a) acquired the below-described property, which was derived from the proceeds obtained directly or indirectly as a result of the commission of the aforesaid violation of 21 United States Code, Section 846; and

(b) used, or intended to use, the below-described property in any manner or part, to commit or facilitate the commission of the aforesaid violation of 21 United States Code, Section 846.

This property includes, but is not limited to the following:

(a) $19,100.00, more or less, in United States Currency, and

(b) 7500 Bloomington Avenue, Burbank, California, more fully described as:

Lot 41 of Tract No. 17309, in the City of Los Angeles, County of Los Angeles, State of California, as per map recorded in book 443 pages 11 and 12 of

Maps, in the office of the county recorder of said county.

Except all right to oils and minerals in and under said land. But without right of entry to the surface of said land. As recited in the declaration of restriction executed by Cobasset Homes, Inc., a corporation; recorded in book 42390 page 428, official records and excepted in deed recorded December 2, 1953.

By virtue of the commission of one or more of the felony offenses charged in this indictment by the defendant REYNALDO CORTEZ, SR., any and all interest the defendant has in the above-described property is forfeitable to the United States upon conviction, pursuant to 21 United States Code, Sections 853(a)(1) and (a)(2).

If any of the property described as being subject to forfeiture pursuant to Title 21, United States Code, Section 853, as a result of any act or omission of the defendant,

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third person;

(3) has been placed beyond the jurisdiction of the Court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), to seek forfeiture of any other property of said defendant up to the value of said property forfeitable in the paragraphs above.

The aforementioned property is subject to forfeiture pursuant to Title 21, United States Code, Sections 853(a)(1) and 853(a)(2).

A TRUE BILL.

_____
FOREPERSON

Stephen Patrick O'Meara
United States Attorney

By: _____
Jason T. Griess
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

Criminal No. 04-116

UNITED STATES OF AMERICA,
Plaintiff,

v.

BRIAN MICHAEL GALL,
Defendant.

PLEA AGREEMENT

IT IS HEREBY AGREED by and between the plaintiff, the United States of America, and the defendant, BRIAN MICHAEL GALL, with his attorney, Marc Milavitz, as follows:

A. *CHARGES*

1. *Subject Offense.* Defendant will plead guilty to Count 1 of the Indictment which charges a violation of Title 21, United States Code, Section 846 and 841(b)(1)(C), that is, conspiracy to distribute a mixture and substance containing methylenedioxymethamphetamine (MDMA), a Schedule I controlled substance.

2. *Charges Being Dismissed.* There are no charges to be dismissed.

3. *No Further Prosecution.* The United States of America agrees that the defendant will not be charged in the Southern District of Iowa with any other federal criminal offense under Title 18 or Title 21, United States Code, arising from or directly relating to this investigation, except for any crimes of violence. This paragraph and this plea agreement do

not apply to any criminal act which the defendant did not fully disclose to law enforcement during his proffer interviews.

B. *CONSEQUENCES OF PLEA*

4. *Maximum Punishment.* Count 1 is punishable by a maximum term of 20 years imprisonment, a maximum fine of not more than $1,000,000.00, or both, plus a special assessment of $100.00, and a term of supervised release of at least 3 years.

5. *Mandatory Minimum.* There is no mandatory minimum sentence.

6. *Mandatory Detention.* Pursuant to the Mandatory Detention for Offenders Convicted of Serious Crimes Act (18 U.S.C. § 3143), the defendant understands that the law requires that defendant may be ordered to be placed in the custody of the United States Marshall's Service following the completion of the entry of the guilty plea to await imposition of sentence. The defendant understands that defendant bears the burden to show the court that defendant should remain on conditions of release pending sentencing.

C. *SENTENCING CONSIDERATIONS*

7. *Sentencing Guideline—Factors.* The sentence to be imposed is solely within the District Court's discretion, with due consideration for the United States Sentencing Commission Guidelines which apply to this offense.[1] The Sentencing Guidelines establish a sentencing range based upon factors determined to be present in the case, which include, but are not limited to the following:

a. the quantity of drugs involved, with the parties stip-

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[1] The parties stipulate that the November 1, 1999 edition of the United States Sentencing Guidelines apply to the defendant's offense conduct in this case.

ulating as a recommendation to the court that the defendant is responsible for at least 2,500 grams of a mixture and substance containing methylenedioxymethamphetamine (MDMA), or the equivalent of at least 87.5 kilograms of marijuana;

b. the defendant's role in the offense;

c. criminal history (prior convictions); and

d. acceptance or lack of acceptance of responsibility;

8. *No Promises.* The United States makes no representations or promises as to the sentence to be imposed, as this is solely within the District Court's discretion. Although the parties may have discussed the possibilities of various factors having an impact on the sentence and the possibility of a certain sentencing range, the parties agree that no discussion resulted in any express or implied promise or guarantee concerning the actual sentence to be imposed.

9. *No Right to Withdraw Plea.* The defendant understands that the defendant will have no right to withdraw the defendant's plea if the sentence imposed, or the application of the United States Sentencing Commission Guidelines, is other than what the defendant anticipated. The parties understand the Court may defer its decision to accept the plea until there has been an opportunity to review a pre-sentence investigation report.

10. *Evidence at Sentencing.* The defendant, the defendant's attorney, and the plaintiff's attorney will be permitted to make whatever comment and evidentiary offer they deem appropriate at the time of the guilty plea, sentencing, or any other proceeding related to this case, provided such offer or comment does not violate any other provision of this agreement. The parties are also free to provide all relevant information to the U. S. Probation Office for use in preparing a pre-sentence report.

11. *Fines/Costs.* Issues relating to fines and/or costs of incarceration are not dealt with in this agreement, and the parties are free to espouse their respective positions at sentencing.

12. *Special Assessment.* The defendant agrees to pay to the United States a special assessment of $100.00, as required by Title 18, United States Code, § 3013. The defendant agrees to make such payment (by cashiers check or money order payable to "Clerk, U. S. District Court") to the Clerk of the United States District Court for the Southern District of Iowa within two weeks (14 days) of the execution of this agreement or by the time the defendant enters his guilty plea, whichever first occurs. The defendant understands that failure to pay the special assessment constitutes a material breach of this agreement.

D. *COOPERATION*

13. *Full Cooperation.* The defendant agrees to fully cooperate with the government in its investigation within the Southern District of Iowa and elsewhere, and will provide complete and truthful information to the attorneys and law enforcement officers of the government, any federal grand jury, and any Court. The defendant will answer all questions concerning any criminal matters of which defendant has knowledge truthfully, and defendant will not withhold any information. The defendant will neither attempt to protect any person or entity through false information or omission, nor falsely implicate any person or entity. The defendant understands that failure to provide complete and truthful information constitutes a material breach of this agreement.

14. *Financial Statement.* The defendant agrees to fully and truthfully complete the financial statement, and provide the U. S. Attorney's Office with any information or documentation in the defendant's possession or control regarding the defendant's financial affairs. Failure to truthfully complete

the financial statement form in its entirety, or failure to submit to a financial examination when requested, will constitute a breach of this agreement and may, in the sole discretion of the U.S. Attorney's Office, result in the revocation of the agreement and the institution or reinstatement of other criminal charges against the defendant.

15. *Access to Defendant Upon Entry Into Plea Agreement.* From and after the date of the parties entry into this plea agreement, the defendant agrees to be available to perform the cooperation provided by this plea agreement without the United States Attorney first notifying and receiving authorization from the defendant's attorney. Attorneys and investigators for the United States have standing authority to request the defendant to provide cooperation required by this agreement. Should the defendant elect to speak to anyone other than attorneys and investigators for the United States about the information known to the defendant regarding crimes, the defendant shall, prior to discussing such information with such other person, give notice to United States Attorney a reasonable time in advance of such discussion to allow representatives of the United States Attorney to be present for such discussion. The United States Attorney requests to have a representative present or any such discussions, should they occur.

16. *Communications with Defendant.* In furtherance of the "Cooperation" provisions of this agreement, attorneys and investigators of the United States are hereby authorized to communicate directly with the defendant without any further notification to or authorization from the defendant's attorney. The United States Attorney agrees that should the defendant indicate that he wants to confer with his attorney prior to further activity, communications will be suspended until the defendant has the opportunity to confer with his attorney. The United States desires to have a representative present if the defendant ever elects to discuss his knowledge of criminal

activity with any person other than its attorneys and investigators. The defendant agrees that he will not discuss his knowledge of criminal activity with any person without first giving the United States notice of his intention and affording the United States the opportunity to have a representative present for any such discussion.

17. *Truthful Testimony*. The United States insists upon the defendant telling the truth at all times, whether it be during this investigation or as a witness at trial, and regardless of who asks the questions (the prosecutor, the law enforcement agent, the judge, or the defense attorney). In the event the defendant should be called as a witness, the defendant's failure to provide truthful information will render this agreement voidable at the sole discretion of the United States, and will subject the defendant to a prosecution for perjury which is punishable by a fine of not more than $250,000.00 and a term of imprisonment of not more than five years, or both such fine and imprisonment.

18. *Debriefing Statements—Limitation of Usage*. Pursuant to U.S. Sentencing Guidelines Section 1B1.8, the government agrees not to use against the defendant any self-incriminating information provided by the defendant in his proffer interviews or any subsequent interview as provided for in paragraphs 15 and 16 of this agreement, except as follows:

a. if the defendant admits conduct in a proffer interview or debriefing and then denies the same or presents evidence to the contrary at any hearing subsequent to the signing of this plea agreement; or,

b. to the extent as may be permitted by paragraph 20 of this agreement in the case of a breach of this agreement by the defendant.

19. *Effect of a Violation of Law*. Any violation of law or any violation of pretrial release conditions committed by the

defendant will render this agreement voidable at the sole discretion of the United States.

20. *Breach—Use of Information.* If the defendant breaches the terms and conditions of this agreement, the government is free to use against the defendant any statement given by the defendant in proffer interviews, debriefings or during testimony. Such statements or testimony may be used against the defendant in any criminal prosecution including prosecutions of the instant offense, perjury, obstruction of justice, or other applicable criminal prosecution relating to the giving of a false statement.

21. *Polygraph Examination.* The defendant agrees that the plaintiff, at its expense, may require that the defendant submit to polygraph examination(s). Any refusal to take a polygraph examination is a material breach of the plea agreement. A finding by the examiner that the defendant shows deception during a polygraph examination such that the examiner does not have confidence that the defendant has told the truth concerning any matter constitutes a breach of the plea agreement. The defendant shall have an opportunity to correct any information that results in a deceptive response found by the examiner, if the defendant does not satisfy the examiner concerning the deception then the same shall be considered a material breach of the plea agreement.

E. *SUBSTANTIAL ASSISTANCE*

22. *United States Attorney Motion.* Should the Defendant fully comply with all the terms and conditions of this plea agreement and the United States Attorney concludes that the Defendant has provided substantial assistance in the investigation or prosecution of one or more other persons who have committed a criminal offense, the United States Attorney may file a motion with the Court, requesting the Court to depart from the sentencing guidelines in its sentencing of the Defendant. Such motion may be made pursuant to United

States Sentencing Guideline Section 5K1.1 or Title 18, United States Code, Section 3553(e), or both. The decision to file a motion for departure will be in the sole discretion of the United States Attorney. The Defendant understands that the United States Attorney will decide whether the Defendant has performed substantial assistance sufficient to warrant such a motion. A proffer interview or a debriefing statement does not necessarily constitute substantial assistance to the United States. The Defendant further understands that if a motion is filed, the Court will decide whether the Defendant has performed substantial assistance and, if so, the amount of reduction in sentence that is to be granted.

23. *Amount of Reduction.* The appropriate reduction, if any, shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

a. the court's evaluation of the significance and usefulness of the Defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

b. the truthfulness, completeness, and reliability of any information or testimony provided by the Defendant;

c. the nature and extent of the Defendant's assistance;

d. any injury suffered, or any danger or risk of injury to the Defendant or his/her family resulting from Defendant's assistance;

e. the timeliness of the Defendant's assistance.

24. *Waiver of Speedy Trial.* The defendant waives and agrees to waive any and all rights under the Speedy Trial Act and understands and agrees that sentencing may be delayed until the cooperation phase of this agreement has been completed. Defendant stipulates that such a delay is in Defendant's best interest and in the interest of justice and con-

stitutes full and sufficient grounds for the Court to find that any delay in this judicial process regarding the defendant is excludable time in computing compliance with any federal speedy trial requirements which may apply to this matter. This waiver is necessary so that the Court will have the benefit of all relevant information regarding defendant's cooperation at the time of sentencing, should the United States Attorney, in his discretion, elect to file a motion pursuant to paragraph 22 of this agreement. Completion of the defendant's cooperation will be determined by this United States Attorney Office, in its sole discretion.

F. *GENERAL MATTERS*

25. *Voluntariness of Plea.* The Defendant acknowledges that he is entering into this plea agreement and is pleading guilty because he is guilty. He further acknowledges that he is entering into this agreement without reliance upon any discussions between the government and himself (other than those described in this plea agreement), without promise of benefit of any kind (other than any concessions contained in this plea agreement), and without threats, force, intimidation, or coercion of any kind. He further acknowledges that he understands the nature of the offenses to which he is pleading guilty, including the penalties provided by law.

26. *Limited Scope of Agreement.* This agreement does not limit, in any way, the right or ability of the government to investigate or prosecute the defendant for crimes occurring outside the scope of this agreement. Additionally, this agreement does not preclude the government from pursuing any civil or administrative matters against the defendant, including, but not limited to, civil tax matters and civil forfeiture, which arise from, or are related to, the facts upon which this investigation is based.

27. *Entire Agreement.* This plea agreement, and any attach ments, constitute the entire agreement between the parties. No

other promises of any kind, express or implied, have been made to the Defendant by the United States or by its agents.

28. *Factual Stipulations.* Attached hereto as Attachment "A", and incorporated by reference herein, are factual stipulations entered into between the parties, including the factual stipulations of the defendant's offense conduct relating to each subject offense.

29. *Use of Information.* If the defendant breaches the terms and conditions of this agreement, or is allowed to withdraw his guilty plea for any reason, the government is free to use against the defendant Attachment "A" of this agreement. Attachment "A" may be used against the defendant in any criminal prosecution including prosecutions of the instant offense, perjury, obstruction of justice, or other applicable criminal prosecution relating to the giving of a false statement.

30. *Venue.* Defendant agrees that the offense conduct relating to the subject offenses was committed, in whole or in part, in the Southern District of Iowa, and that the U.S. District. Court, Southern District of Iowa, has proper venue of this agreement.

31. *Public Interest.* The Plaintiff and Defendant state this plea agreement is in the public interest and it takes into account the benefit to the public of a prompt and certain disposition of the case and furnishes adequate protection to the public interest and is in keeping with the gravity of the offense and promotes respect for the law.

32. *Execution/Effective Date.* This agreement does not become valid and binding until the Plea Agreement, the Attachment A (Stipulation of Facts), and the Statement by Defendant in Advance of Plea of Guilty are executed by each of the parties and their counsel shown below. The United States Attorney's Office may withdraw this plea agreement offer at any time prior to its acceptance and execution by the

defendant and receipt of the documents at the United States Attorney's Office.

The undersigned hereby accept and agree to the terms and conditions set forth in this Plea Agreement.

H. *SIGNATURES*

33. *Defendant.* I have read all of this plea agreement and have discussed it with my attorney. I fully understand the plea agreement and accept and agree with it without reservation. I do this voluntarily and of my own free will. No promises have been made to me other than the promises in this plea agreement. I have not been threatened in any way to get me to enter into this plea agreement. I am satisfied with the services of my attorney with regard to this plea agreement and other matters associated with this case. I am entering into this plea agreement and will enter my plea of guilty under this agreement because I committed the crime to which I am pleading guilty.

3/2/05 /s/ Brian Michael Gall
Date BRIAN MICHAEL GALL
Defendant

34. *Defendant's Attorney.* I have read this plea agreement and have discussed in its entirety with my client. There is no plea agreement other than the agreement set forth in this writing. My client fully understands this plea agreement. I am satisfied my client is capable of entering into this plea agreement, and does so voluntarily of his own free will, and without any coercion or compulsion. I believe there is a factual basis for the plea and concur in my client entering into this plea agreement and in entering a plea of guilty pursuant to the plea agreement.

3/2/05 /s/ Marc Milavitz
Date MARC MILAVITZ
Attorney for Defendant

1733 Canyon Blvd.
Boulder, CO 80302
Tel: (303) 442-2166
Fax: (303) 440-4515

35. *United States of America.*

United States of America

Matthew G. Whitaker
United States Attorney

Date

Jason T. Griess
Assistant United States Attorney
U.S. Courthouse Annex, 2nd Floor
110 E. Court Avenue
Des Moines, Iowa 50309
Tel: (515) 284-6383
Fax: (515) 284-6492
Email: Jason.Griess2@usdoj.gov

ATTACHMENT A
STIPULATION OF FACTS

COMES NOW the undersigned Assistant United States Attorney for and on behalf of the United States of America, plaintiff in the above captioned matter, and defendant, BRIAN MICHAEL GALL, and defendant's attorney, Marc Milavitz, and hereby stipulate and agree that the following facts are true and correct and may be used by the Court to establish a factual basis for the plea of guilty to be entered by defendant pursuant to the plea agreement, and for purposes of sentencing:

1. That beginning by on or about February of 2000, and continuing to on or about September of 2000, the defendant, BRIAN MICHAEL GALL, entered into an agreement or understanding with others to distribute methylenedioxymethamphetamine (MDMA). The persons with whom the defendant agreed to distribute methylenedioxymethamphetamine (MDMA) include but are not limited to: Luke Rinderknecht, Theodore Sauerberg, Corey Coleman, Ross Harbison and Mark Goodding.

2. That the defendant, BRIAN MICHAEL GALL, voluntarily and intentionally joined the agreement or understanding, either when it was first reached or at some later time while it was still in effect.

3. That at the time the defendant, BRIAN MICHAEL GALL, joined in the agreement or understanding, he knew that the purpose of the agreement or understanding was to distribute methylenedioxymethamphetamine (MDMA).

4. That as part of the agreement or understanding the defendant, BRIAN MICHAEL GALL, distributed methylenedioxymethamphetamine (MDMA), obtained from Luke Rinderknecht and Theodore Sauerberg, to other individuals including but not limited to: Ross Harbison, Mark Goodding and Corey Coleman.

5. That at the time the defendant, BRIAN MICHAEL GALL, distributed quantities of methylenedioxymethamphetamine (MDMA) to Ross Harbison, Mark Goodding and Corey Coleman, he was aware that they intended to redistribute the methylenedioxymethamphetamine (MDMA) to other individuals.

6. That during the course of the conspiracy, the defendant, BRIAN MICHAEL GALL, was responsible for, but did not necessarily distribute himself, at least 2,500 grams of a mixture and substance containing methylenedioxymethamphetamine (MDMA), or the equivalent of at least 87.5 kilograms of marijuana.

7. That by on or about September of 2000, the defendant, BRIAN MICHAEL GALL, communicated his intent to stop distributing methylenedioxymethamphetamine (MDMA) to other members of the conspiracy including but not limited to Luke Rinderknecht and Mark Goodding.

8. That the defendant, BRIAN MICHAEL GALL, was aware that it is illegal to distribute methylenedioxymethamphetamine (MDMA).

9. That part of the conspiracy occurred in the Southern District of Iowa.

10. The defendant, BRIAN MICHAEL GALL, hereby certifies that the facts set forth above are true and accurate to the best of his knowledge.

3/2/05 /s/ Brian Michael Gall
Date BRIAN MICHAEL GALL
Defendant

3/2/05 /s/ Marc Milavitz
Date MARC MILAVITZ
Attorney for Defendant

Date Jason T. Griess
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

No. 04-116

UNITED STATES OF AMERICA
Plaintiff,

vs.

ANTONIO FERNANDEZ PEREZ, REYNALDO CORTEZ, SR., JESSE LEE CRAWFORD, BROOKS THOMAS ROBINSON, BRIAN MICHAEL GALL, THEODORE JOSEPH SAUERBERG, COREY ALAN COLEMAN, AND JAROD JAMES YODER,
Defendants.

DEFENDANT'S GALL'S SENTENCING MEMORANDUM

Comes now Defendant Brian Gall, by and through his attorney, Marc Milavitz, of the Alternative Law Office of Marc Milavitz, P.C., files the following Sentencing Memorandum setting forth all factors that the Court should consider in determining what type and length of sentence is sufficient, but not greater than necessary, to comply with the statutory directives set forth in 18 U.S.C. § 3553(a). Mr. Gall is a person who has a minimal criminal history, a person who was a drug user and lower level dealer for three months when he was in college, who was near the bottom rung of an ecstasy conspiracy and who a member of the conspiracy for a relatively short amount of time (three months) and dealt a relatively small amount of drugs, a person who voluntarily withdrew from the conspiracy over five years ago and a person who, for the past five years and while on pre-sentence supervision for the past ten months, has done extremely well in abiding by the law. Mr. Gall believes it would be

counterproductive to society as a whole as well as to his for the Court to imprison him and proposes that the Court sentence him to a term of probation so that he can continue as a law abiding citizen, business owner and a productive member of society.

Sentencing under *Booker*

On January 12, 2005, the Supreme Court ruled that its Sixth Amendment holding in *Blakely v. Washington*, 124 S. Ct. 2531 (2004) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000) applies to the Federal Sentencing Guidelines. *United States v. Booker*, 125 S. Ct. 738, 756 (2005). Given the mandatory nature of the Sentencing Guidelines, the Court found "no relevant distinction between the sentence imposed pursuant to the Washington statutes in Blakely and the sentences imposed pursuant to the Federal Sentencing Guidelines" in the cases before the Court. *Id.* at 751. Accordingly, reaffirming its holding in *Apprendi*, the Court concluded that

> [a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt. *Id.* at 756.[1]

---

[1] It should be noted that the fact-of-prior-conviction exception to the Apprendi rule is based on *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). But the continued vitality of this case and the exception it created has been called into question not only by the broad reasoning of Booker itself, which would seem to apply to all enhancement facts, including facts of prior conviction, but also more recently by *Shepard v. United States*, 125 S. Ct. 1254 (2005). *Shepard* sharply limits the *Almendarez-Torres* exception to the fact of prior conviction as determined by the judicial record, and excludes facts about the conviction which are not contained in such conclusive records. As Justice Thomas notes, moreover, five justices agree that *Almendarez-Torres* was wrongly decided. 125 S. Ct. at 1264 (Thomas, J., concurring).

Based on this conclusion, the Court further found those provisions of the federal Sentencing Reform Act of 1984 that make the Guidelines mandatory, 18 U.S.C. § 3553(b)(1) or which rely upon the Guideline's mandatory nature, 18 U.S.C. § 3742(e), incompatible with its Sixth Amendment holding. *Booker*, 125 S. Ct. at 756. Accordingly, the Court severed and excised those provisions, "mak[ing] the Guidelines effectively advisory." *Id.* at 757.

Instead of being bound by the Sentencing Guidelines, the Sentencing Reform Act, as revised by *Booker*,

> requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a).

Booker, 125 S. Ct. at 757. Thus, under Booker, sentencing courts must treat the guidelines as just one of a number of sentencing factors set forth in 18 U.S.C. § 3553(a).

The primary directive in Section 3553(a) is for sentencing courts to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph 2." Section 3553(a)(2) states that such purposes are:

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

In determining the minimally sufficient sentence, § 3553(a) further directs sentencing courts to consider the following factors:

> 1) "the nature and circumstances of the offense and the history and characteristics of the defendant" (§ 3553(a)(1);
>
> 2) "the kinds of sentences available" (§ 3553(a)(3);
>
> 3) "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct (§3553(a)(6); and
>
> 4) "the need to provide restitution to any victims of the offense." (§ 3553(a)(7)).

Other statutory sections also give the district court direction in sentencing. Under 18 U.S.C. § 3582, imposition of a term of imprisonment is subject to the following limitation: "in determining whether and to what extent imprisonment is appropriate based on the Section 3553(a) factors, the judge is required to "recogniz[e] that imprisonment is *not* an appropriate means of promoting correction and rehabilitation"" (emphasis added).

Under 18 U.S.C. § 3661, "*no limitation* shall be placed on the information concerning the background, character, and conduct of [the defendant] which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence" (emphasis added). This statutory language certainly overrides the (now-advisory) policy statements in Part H of the sentencing guidelines, which list as "not ordinarily relevant" to sentencing a variety of factors such as the defendant's age, educational and vocational skills, mental and emotional conditions, drug or alcohol dependence, and lack of guidance as a youth. *See* U.S.S.G. § 5H1. See also *United States v. Nellum*, 2005 WL 300073, 2005 U.S. Dist. LEXIS 1568 (N.D. Ind. Feb. 3, 2005) (Simon, J.)

(taking into account fact that defendant, who was 57 at sentencing, would upon his release from prison have a very low likelihood of recidivism since recidivism reduces with age; citing Report of the U.S. Sentencing Commission, Measuring Recidivism: the Criminal History Computation of the Federal Sentencing Guidelines, May 2004); *United States v. Naylor*, F. Supp. 2d, 2005 WL 525409, *2, 2005 U.S. Dist. LEXIS 3418 (W.D. a. Mar. 7, 2005) (Jones, J.) (concluding that sentence below career offender guideline range was reasonable in part because of defendant's youth when he committed his predicate offenses—he was 17—and noting that in *Roper v. Simmons*, 125 S. Ct. 1183, 1194-96 (2005), the Supreme Court found significant differences in moral responsibility for crime between adults and juveniles).

The directives of *Booker* and § 3553(a) make clear that courts may no longer uncritically apply the guidelines. Such an approach would be

> "inconsistent with the holdings of the merits majority in Booker, rejecting mandatory guideline sentences based on judicial fact-finding, and the remedial majority in Booker, directing courts to consider all of the § 3353(a) factors, many of which the guidelines either reject or ignore." *United States v. Ranum*, 353 F. Supp. 2d 984, 985-86 (E.D. Wisc. Jan. 19, 2005) (Adelman, J.).

As another district court judge has correctly observed, any approach which automatically gives "heavy" weight to the guideline range "comes perilously close to the mandatory regime found to be constitutionally infirm in Booker." *United States v. Jaber*,—F. Supp. 2d __, 2005 WL 605787 *4 (D. Mass. March 16,__ 2005) (Gertner, J.). See also *United States v. Ameline*, 400 F.3d 646, 655-56 (9th Cir. Feb. 9, 2005) (advisory guideline range is "only one of many factors that a sentencing judge must consider in determining an appropriate individualized sentence"), reh'g en banc granted, 401 F.3d 1007 (9th Cir. 2005).

Justice Scalia explains the point well in his dissent from Booker's remedial holding:

> Thus, logic compels the conclusion that the sentencing judge, after considering the recited factors (including the guidelines), has full discretion, as full as what he possessed before the Act was passed, to sentence anywhere within the statutory range. If the majority thought otherwise—if it thought the Guidelines not only had to be 'considered' (as the amputated statute requires) but had generally to be followed—its opinion would surely say so.

Booker, 125 S. Ct. at 791 (Scalia, J., dissenting in part). Likewise, if the remedial majority thought the guidelines had to be given "heavy weight," its opinion would have said so. The remedial majority clearly understood that giving any special weight to the guideline range relative to the other Section 3553(a) factors would violate the Sixth Amendment.

In sum, in every case, a sentencing court must now consider all of the § 3553(a) factors, not just the guidelines, in determining a sentence that is sufficient but not greater than necessary to meet the goals of sentencing. And where the guidelines conflict with other sentencing factors set forth in § 3553(a), these statutory sentencing factors should generally trump the guidelines. See *United States v. Denardi*, 892 F.2d 269, 276-77 (3d Cir. 1989) (Becker, J, concurring in part, dissenting in part) (arguing that since § 3553(a) requires sentence be no greater than necessary to meet four purposes of sentencing, imposition of sentence greater than necessary to meet those purposes violates statute and is reversible, even if within guideline range).

Application of the Statutory Sentencing Factors
to the Facts of this Case

In the present case, the following factors must be considered when determining what type and length of sentence is

sufficient, but not greater than necessary, to satisfy the purposes of sentencing:

1. The Nature and Circumstances of the Offense and the History and Characteristics of the Offender

(a) Nature and Circumstances of Offense

In this instance, Mr. Gall was purchasing relatively small to medium quantities of ecstasy for personal use as well as for resale for a limited period of time (three months) over five years ago while he was in college. In essence, he was at the either the lower middle portion or near the bottom of the conspiracy, and his only illegal activity was the possession, sale and use of ecstasy.

(b) History and Characteristics of Mr. Gall

> As noted in the presentence report, Mr. Gall is generally a law abiding citizen. Except for his underage drinking, open gun container (during a hunting trip) and the possession of marijuana case which was dismissed, his criminal history is devoid of any crimes. He did have issues revolving around substance abuse, however he has taken positive steps to address those problems and so far has successfully remained substance free. He is in a stable relationship with his girl-friend and all of his drug tests since his release to on pre-trial supervision have been negative. He has long ago disassociated himself with those in his past who have tended to stray and has committed himself to a clean, law abiding life style. He currently has his own business where he employees on a contract basis two individuals, is currently working on three jobs, has another four to five jobs lined up in the next three months and has bids out on other jobs. He pays his taxes and has a loving, supportive family network in Iowa and many friends and other who stand behind him. In sum, he

has lived an exemplary, law-abiding life since voluntarily withdrawing from the conspiracy and done extremely well while on pre-trial release.

2. The Need for the Sentence Imposed To Promote Certain Statutory Objectives:

(A) to reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense

There is no doubt in Mr. Gall mind that what he did was wrong and against the law. However, he has vowed to never put himself in a position where there is even the possibility he may have to go to jail. If Mr. Gall is placed on probations, he is well aware that any relapse or future criminal conduct on his part will result in a prison sentence, something he does not wish to experience.

(B) to afford adequate deterrence to criminal conduct

A probation sentence does afford adequate deterrence to future criminal conduct by Mr. Gall. His voluntary with-drawal from the conspiracy as well as his behavior for the past five years demonstrates that he has learned his lesson. Additionally, he has responded very favorably to pre-trial supervision. This is evidenced from the reports of his pre-trial release supervisor, who has agreed with his moving to Iowa.

(C) to protect the public from further crimes of the defendant

Probation would be a sufficient safeguard for the public. Mr. Gall is not a violent person, there are no weapons involved and he is not a danger to anyone. It is anticipated that probation would carefully monitor and supervisor Mr.

Gall to protect the public from any criminal behavior or relapse on his part.

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner

The best method for providing Mr. Gall with substance abuse treatment and monitoring would by far and away be outpatient care that he could receive while on probation. It is undisputed that that there is a greater degree of flexibility and a wider variety of treatment programs available to Mr. Gall if he is not incarcerated then his treatment options if in prison. As stated above, Mr. Gall is not in need of punishment or separation from society; he is in need of monitoring and possibly treatment.

3. The Kinds of Sentences Available

In *Booker*, the Supreme Court severed and excised 18 U.S.C. § 3553(b), the portion of the federal sentencing statute that made it mandatory for courts to sentence within a particular sentencing guidelines range. *Booker*, 125 S. Ct. at 756. This renders the sentencing guidelines advisory. *Id.* Under 18 U.S.C. § 3561, this Court does have the discretion to impose a probation sentence for Mr. Gall.

4. The Sentencing Range Established by the Sentencing Commission

The probation department has calculated that Mr. Gall would have a total offense history of 19 points and the probation department calculating that Mr. Gall falls within criminal history I, resulting in a guideline provision range of a sentence of 30-37 months of incarceration. In this instance, the guideline range does not adequately reflect the Mr. Gall's conduct or personal history. Specifically, it fails to take into account the young age of Mr. Gall when this event took place, the short time he was involved in criminal activity and

the fact he voluntarily withdrew from the conspiracy. It also fails to take into account Mr. Gall's law abiding behavior since the time of this incident and his exemplary behavior before and since this three month window in his life. From all indications, this behavior was an aberration and not the norm. During Mr. Gall's short life, he has either worked or been in school, he has been an upstanding person and has been a person whom people are proud to call a family member, a friend or an employee and now an employer and businessman. Many people, including his family, the businesses he works with and hi employees depend on Mr. Gall, and he has proven himself worthy of this responsibility. None of these factors are taken into consideration by the sentencing guidelines.

Proposed "Statement of Reasons Pursuant to 18 U.S.C. § 3553(c)" for sentence below guideline range.

There simply is no reason to further incarcerate Mr. Gall and a multitude of reasons to place him on probation and allow him to continue being a productive member of society. As enunciated above, Mr. Gall has succeeded while on pre-trial release status. He has kicked his ecstasy habit as evidenced by graduating from college, starting and succeeding in his own business, employing others and clean drug tests. Mr. Gall has been either been in school or gainfully employed since his withdrawal from the conspiracy and has maintained a stable and drug-free environment. Probation would continue the supervision of Mr. Gall which was started by pre-trial release and make very effort to promote and encourage continued success for Mr. Gall. Mr. Gall's only criminal activity is one of a drug use and dealing and as long as he continues to remain substance free, he poses no threat to society or himself. Given the lack of criminal history, the nature of the crime itself, the rehabilitative efforts by Mr. Gall and his perfect compliance with pre-trial release, a probation sentence best fits this case and is appropriate for Mr. Gall.

Conclusion

For the foregoing reasons, Brian Gall respectfully submits that a sentence of 12 months probation to comply with the statutory directives set forth in 18 U.S.C. § 3553(a).

Respectfully submitted,

/s/: Marc Milavitz DATED: May 20, 2005

MARC MILAVITZ
The Alternative Law Office of Marc Milavitz, P.C.
Lawyer for Mr. Gall
1733 Canyon Blvd.
Boulder, CO 80304
303-442-2166
fax 440-4515

CERTIFICATE OF SERVICE

A photocopy of the foregoing GALL SENTENCING MEMORANDUM was mailed to the postage prepaid, on 20th day of May, 2005, to the following:

JASON GRIESS
United States Attorney
U.S. Court House and Annex
2nd Floor
110 E. Court Ave.
Des Moines 50309

KAREN DASSINGER U.S. Probation Officer
United States District Court
Southern District of Iowa
Des Moines, IA 50309

/s/: Marc Milavitz

11360 130th Street
Davenport, Iowa. 52804
May 15, 2005

Judge Pratt
US District of Iowa
110 East Court Avenue
Room 127
Des Moines, IA 50309-2052

RE: Brain Gall

Dear Judge Pratt,

I am writing to you in regards to the hearing for Brian Gall on May 27, 2005. Brian and I have been dating for the last 18 months. I can hardly believe that the man that I know was a person that would have ever been involved in any type of illegal behavior. Brian has only demonstrated strong family values, a committed work ethic, compassion to others and morals that I would look for in a man that I would be willing to spend the rest of my life with.

Most of the other individuals writing to you on Brian's behalf can share with you his contributions that he can make to the community or how he has changed on the outside. I have an opportunity to share with you the changes Brian has made on the inside. Brian has been honest from day one with me on his past actions that have placed him in this position that has been life altering. Brian has confessed many times that he is haunted by his mistake of being involved with drugs and how it has caused harm to the people he loves and how it has a much larger impact on those people he may never even meet.

Brian and I have planned a future together, and at this point a major part of that future is in your hands. Brian has confessed to me that he should be responsible for the harm and illegal acts he was involved in, but Brian has changed. He is strongly committed to learning from his mistake. Brian is a smart

business man and employer. He is a good son, brother, and uncle. Brian is also the man that I plan to spend the rest of my life with no matter what is placed before us. Please see him for the man he has become and let him continue to make a positive contribution to society. Brian has expressed his willingness to speak to others about his mistake and how it has impacted every aspect of his life. Give him the opportunity to promote change and make restitution, but do not label him for the rest of his life for one very poor mistake.

Sincerely,

/s/ Amy R Plett
AMY R. PLETT

Honorable Judge Pratt
C/O Karen Dassinger
110 E Court Avenue #127
Des Moines, IA 60309

Re: Brian Gall

Dear Sir,

I have been asked to give a reference for Mr. Gall, I am doing so without reservation. I have been working with Mr. Gall on several projects utilizing his construction services. I have been very impressed on how he conducts his business; he is prompted and honors his commitments. I have asked him if he would consider taking on some large projects for me but he came to me and explained that there were circumstances that would not allow him to make such a commitment at this time. I have many years of experience working with the construction labor industry, most folks would of not have been so honest with me and would of excepted the offer. If his situation does not go well for him this would have left me and others high and dry. He thought of others rather than his own well being by turning down my offer.

I know that I very much would like to continue working with him if the situation will allow it. To find people such as Brian with his integrity is truly hard in the construction industry. I truly hope the best for Mr. Gall.

If I can be of any further assistance to help for a positive result for Mr. Gall, please call on me.

Towncrest Plaza LLC
Michael L. Glick
1708 Newberry Avenue NE
Solon, IA 52333
319.624.1394

Honorable Judge Pratt
C/O Karen Dassinger
110 E Court Avenue #127
Des Moines, IA 60309

May 9, 2005

Re: Brian Gall DBA BMG Construction Service

Your Honor,

My name is Mark Anderson and I am writing in my capacity as the Retail Replacement Sales Manager for Prairie Pella Incorporated of Des Moines Iowa. I have been responsible for sub contracting installation of windows and doors with BMG Construction Service. In this business relationship beginning December of 2004 to the present, I have found the owner Brian Gall to be Reliable, Honest, Friendly, and Polite.

Should you wish to speak to me, regarding Brian's character, I can be reached at 309-678-5459.

Mark A. Anderson
Pella Windows and Doors
Retail Replacement Sales Manager 725/730
Mobile 309-678-5459
E-Mail maanderson@129.pellapdsn.com

[LOGO]

DATE: 05-10-2005

TO: JUDGE PRATT C/O KAREN DASSINGER
110 E COURT AVE ROOM 127
DES MOINES, IA 50309

FROM: FRED NOVY, PELLA COMMERCIAL SALES

RE: LETTER OF REFERENCE FOR BRIAN MICHAEL GALL

DEAR JUDGE PRATT:

I HAVE KNOWN BRIAN GALL PROFESSIONALLY SINCE THE SUMMER OF 2000. HE WAS EMPLOYED AS A WINDOW INSTALLER. AT THAT TIME, HIS JOB PERFORMANCE WAS EXEMPLARY. HE FINISHED HIS WORK ON TIME AND WAS POLITE AND COURTEOUS TO BOTH CUSTOMERS AND FELLOW WORKERS. WHEN HE MOVED TO ARIZONA IN THE FALL OF 2002, I GAVE HIM A POSITIVE WORK REFERENCE, WHICH HELPED HIM SECURE A POSITION AS AN INSTALLER FOR OUR PELLA WINDOW AFFILIATE IN TEMPE, ARIZONA. HE RETURNED TO IOWA IN 2004, CONTACTED ME AND AGAIN BEGAN TO INSTALL WINDOWS FOR MYSELF, OTHER PELLA SALESMAN, AS WELL AS LOCAL AREA CONTRACTORS. HE CONTINUES TO DEMONSTRATE A SUPERIOR WORK ETHIC, AND IS A VALUABLE RESOURCE FOR MY BUSINESS. WITH THE START OF THE SPRING BUSINESS CYCLE I HAVE CONTRACTED WITH BRIAN TO COMPLETE AT LEAST EIGHT WINDOW AND DOOR RELACEMENT JOBS IN IOWA CITY, DAVENPORT, CEDAR RAPIDS, AND THE SURROUNDING AREA. BRIAN AND I ARE CURRENTLY WORKING TO LAND A LARGE WINDOW AND DOOR REPLACEMENT PROJECT ON THE

CAMPUS OF NORTHWESTERN UNIVERSITY, EVANSTON, ILLINOIS. THIS PROJECT IS TO START IN JUNE OF 2005 AND BE FINISHED IN LATE AUGUST, AND BRIAN'S PRESENCE WILL BE CRITICAL.

BRIAN IS AN INTEGERAL AND QUALIFIED MEMBER OF OUR TEAM AND FINDING A SUITABLE REPLACEMENT FOR HIM WOULD BE VERY DIFFICULT. I WOULD ASK THAT YOU ALLOW HIM TO REMAIN AS AN INDEPENDENT CONTRACTOR FOR WINDOWS BY PELLA INC.

SINCERELY,

FRED NOVY, PELLA COMMERCIAL SALES

/s/ Fred Novy

Honorable Judge Pratt
U.S. District Court, Southern District of Iowa
Room 127
110 E. Court Ave
Des Moines, IA 50309-2052

Judge Pratt:

We are writing to provide you with a perspective on Mr. Brian Gall, a defendant in a case presently under your review. Our perspective is probably different than the view of Mr. Gall that arises out of courtroom proceedings alone.

Brian is the son of Tom and Vicki Gall, good friends of ours from our church. It is in the church environment that we first met and became acquainted with the Galls. Tom and Vicki provide strength, compassion, and support to us and to their fellow parishioners. Their family life reflects the same values. While it is always possible that a child will wander from home, both geographically and from family teachings, like the prodigal son in Scripture, we have found that where the roots are strong, the child returns to the family and its values.

Brian has been operating his own construction and remodeling business, BMG Construction, for well over a year now. I have seen Brian hard at work, well after normal business hours, sitting at his parent's kitchen table working through the mountain of paperwork necessary to a small business. I have seen him working on the job. Construction is not glamorous, nor easy, but it is good work, and Brian has been slowly building a clientele base. He is also building a base of business associates with whom he can combine or trade work and jobs to smooth the workflow for both his associates and himself.

I most recently saw Brian working with the Rebuilding Together volunteer team from our church, as he led the work to salvage the ceiling of a kitchen in a nearly 100-year old home by installing sheetrock, one of his talents. The home belonged

to a grandmother raising her granddaughter who lacked the resources to maintain the house.

In short, we believe that Brian has the family background, and the present direction and dedication to be a responsible, respected citizen of the community. We have no personal knowledge of the details of the situation that brought Brian to your court room, but we have the strong belief that society would best be served by his returning to his business to try to grow it into a business that will, with his continued hard work, serve him, any future family of his, and his community.

Sincerely, /s/ Bernie Leach
/s/ Glenn Leach
GLENN AND BERNIE LEACH
4705 Ripley St.
Davenport, IA 52806-4127

909 Heiler Court
Eldridge, IA 52748
April 27, 2005

Judge Pratt
U.S. District Court
Southern District of Iowa
110 East Court Ave.
Room 127
Des Moines, IA 50309-2052

Dear Sir:

We are writing in regard to a case you will be hearing on May 27, 2005, concerning Brian Gall.

We have known Brian for thirteen years; since we became friends of the Gall family. We know that Brian has had some difficulties and made some poor choices in his past., as we are close friends of his parents, Tom and Vicki Gall.

Brian has really made efforts to "turn his life around" in the last few years. We know that he felt the need to distance himself from some of his unsavory friends and their practices, so he moved to Colorado to start his own business a couple of years ago. He has worked very hard to make a success of this business, and continues to do so here in Iowa. He has asked his family, parents and friends to pray for him, which is indicative of a desire to improve his life and the quality of his life.

We know that Brian regrets decisions made in his younger years, and has truly made great efforts to become a better citizen.

Thank you for your consideration of our letter.

Sincerely,

Michael McKenna
Jennifer McKenna

Eric Waddell
Sales Manager
Pella Windows and Doors
800 2nd Street
Coralville, IA 52241

Judge Pratt,

I am writing in regards to an upcoming sentencing for Brian Gall. I have been working with Brian for the last year. His company has been installing windows for us during that period. Brian has been doing 2-3 jobs per week over that time period. He has been the best installer I have had in the 4 years I have been here. He is courteous and professional and his work is top notch. He is a great value to our organization.

On a personal note, Brian has told me the situation that he has gotten himself into and he realizes that he has done wrong and has really changed his lifestyle. He works hard to make a living in an honest manner. I feel that Brian is a real asset to society.

Please keep these points in mind during sentencing.

Thanks for your time,

/s/ Eric Waddell
ERIC WADDELL
Pella Sales Manager

May 15, 2005

Judge Pratt
US District Court
Southern District of Iowa
110 East Court Avenue
Room 127
Des Moines, IA 50309-2052

Dear Judge Pratt:

RE: Brian Gall

I am writing on behalf of my son, Brian Gall and his upcoming court appearance for sentencing on May 27, 2005.

Just over a year ago when Brian told us of the trouble he had gotten himself into, I was devastated. I was full of anger and a sense of failure as a parent.

My wife and I asked ourselves what we had done wrong in raising Brian. We came to realize that what he had done was not fault of our own. Whether it was peer pressure of college influences or a sense of being invincible, Brian made some bad choices.

Brian soon realized what he was doing was very wrong and quit. After graduating from college Brian moved away to distance himself from the people who got him involved. After Brian was arrested he came home to the support of his family and friends.

Meanwhile, Brian has worked very hard to establish his own business. Brian installs windows for the Pella Window Co in the Quad Cities as well as Iowa City and Cedar Rapids. He also does remodeling, siding, decks and much more. His business has grown to the point that he has had to hire additional help. Brian is working very hard to become a successful and respected business man.

I am very proud of Brian's accomplishments and how he as turned his life around.

What Brian did should not go unpunished. However I'm asking you to consider extended probation time and community service rather than sending Brian to jail. Thank you.

Respectfully,

Tom Gall
Brian's Father

May 14, 2005

Judge Pratt
c/o Karen Dassinger
U S District Court
Southern District of Iowa
110 East Court Avenue, Room 127
Des Moines, IA 50309-2052

Re: Brian Gall Support:

Dear Judge Pratt

I am writing to you today on behalf of Brian Gall; who he is today, not the mistakes he has made in the past.

My family and I have been acquainted with the Gall's for over 10 years; however, it's only been in the past five years that my acquaintance with Brian's parents Tom & Vicki has grown into a closer friendship. So yes, our close circle of friends are very aware of the parental devastation when Tom & Vicki shared Brian's past bad judgment and his legal troubles.

As a parent of a son and daughter, around Brian's age, I immediately put myself into their role and wondered what if it was my child facing these challenges. As a parent, we can only hope to protect our children from hurts and help them avoid the stumbles and troubles; however, when a bad decision is made, it can't be undone, so we can only unconditionally love them even though we are gravely disappointed in them. We go through all the emotions of hurt, anger, questioning, and then realize the past is just that—we can only go forward, so lean on prayer to give us the hope and strength.

The legal system shares both adherence to the laws and about reforming those who have made bad choices, to again be productive citizens. This is why I want to focus on who Brian is today.

I believe that Brian has demonstrated the best lesson of life: working hard always has more rewards than taking the easy road. He has taken the risk to stand on his own, to start his contracting business. Running a business is about credibility and trust. He has to be able to conduct business with a variety of individuals and businesses, be able to demonstrate his head and hands knowledge of the business, negotiate a fair price and then deliver and stand behind quality prŏduct and workmanship.

I encourage you to consider, within your flexibility of assigning responsibility for wrong doing, that the best solution would be to allow Brian to function within society and to continue his business demonstrating his ability to be reformed by his own self knowledge of right choices.

If a punishment is mandated, rather than jail time, perhaps a better punishment would be for Brian to do hours of community service:

- work with his construction abilities such as working on a Habitat Home,
- or build park playground equipment,
- or something that could benefit many individuals,
- or speak with students about the lessons he learned, anything that sounds too good, really is bad— working hard is where the greatest value resides.

No matter the outcome, we will stand beside the Gall family in friendship and faith. Thank you for allowing the opportunity to share my personal thoughts with you.

Sincerely,

/s/ Deborah S. Stillwell

DEBORAH S. STILLWELL
3219 S. 26th Avenue
Eldridge, IA 52748
563-285-8242

630 S. 10th Street
Eldridge, IA 52748

May 16, 2005

Judge Pratt
US District Court
Southern District of Iowa
110 East Court Avenue
Room 127
Des Moines, IA 50309 -2052

RE: BRIAN GALL
Court Date May 27, 2005

Dear Judge Pratt,

This letter is written on behalf of my nephew through marriage, Brian Gall. This young man has shown to me that he can be an upstanding contributing member of society. His work ethic at job sites is as good as any man I have worked with. His knowledge of tools and his carpentering trade are very impressive. Once he secured enough money from his window replacements and general construction jobs, he purchased a cube van and fixed it up to be his work truck.

Brian is very conscientious and very thoughtful. He rents from me and has saved me many headaches with his general knowledge for fixing the little problems that come up with any household, from plumbing to electrical.

When he started making money from his jobs he didn't waste it, he is pouring it back into his business in the form of bettering and purchasing more tools and the aforementioned cube van.

To send this fine young man to prison would serve no good purpose. I am certain that he will continue with his productive life and make us all proud of him.

Thank You,

/s/ Michael C. Meyer

Deb Lamp
5806 N Pine
Davenport, Iowa
52806

April 28, 2005

Honorable Judge Pratt
U.S. District Court
Southern District of Iowa
110 East Court Ave. Room 127
Des Moines, Iowa 50309-2052

Honorable Judge Pratt;

I am writing you on behalf of Brian Gall who will come before you for sentencing in May. I hope that you will consider where Mr. Gall is at now in his life as compared to at the time of his choice of behavior. He has gone on to make many positive changes in his life and become a productive citizen in society. I have worked in the field of corrections for 15 years and in substance abuse for 8 years and have seen many people come along with similar poor choices. I do believe that justice will not be served with going to prison for this young man. He has made positive changes in his life at this time; going into the prison system many times makes a person bitter. The bitterness coming from the negative impact that prison can make with those that are making progress in their life. Brian has made the changes that come with recovery and maturity; he is now a productive person in business. I would be fearful that a prison sentence would make a very bitter person and negate any positive changes he has made for himself and society. Working in the substance abuse area we do not see enough of the positive turnaround that Brian has made in his life. The prison system though is to be a penalty for the crime is many times a huge negative impact on the individual. I am sure that you know what I am talking about with the prison system.

I pray that you will take into consideration where this young man is today when you decide on the penalty for his choices. I pray that you will consider probation for him so that he will be able to continue to be a productive person in our society.

I write to you on behalf of this young man but also from my experience in the field of corrections and substance abuse. I pray you will take this into consideration. Thank you for your time in this matter.

Sincerely;

Deb Lamp

May 5, 2005

Judge Pratt
US District Court
Southern District of Iowa
110 East Court Avenue, Room 127
Des Moines, IA 50309-2052

Dear Judge Pratt:

I writing to you in regards to the hearing for Brian Gall on May 27, 2005. I am Brian's sister, so of course I am in support of him. However, the reason for my support goes way beyond the fact that we are related.

We grew up in, and continue to have a very close, loving, Christian family. Our family has grown larger in size and some have moved away but we continue to remain very close and cherish our time together. Brian is a fun and loving brother and especially has been a wonderful uncle to my young children, as he has developed a close relationship with them as well.

It is my belief that Brian got caught up with the wrong group of people when he was in college at the University of Iowa. He made some very stupid mistakes and now readily admits that. Despite the terrible mistakes that he did make, he de-cided to leave the state and this group of people to get away from it all and start a career after school. I can remember Brian has always said he was going to own his own business someday. After gaining experience in various areas of construction, he has returned to living in Iowa and his dream is now a reality and he has started his own construction business. He is so proud of this and will eagerly talk to anyone about the work he does. His schedule is always filled with jobs and he has already grown to the point of needing to hire additional employee(s).

Brian has shown the good person that he is in many different ways as well. Despite the probation, hearings, shame and financial setback he has suffered from this terrible experience, he has not let himself give up. As you can tell, he has continued to work hard to reach his life goals. He is a very caring and helpful person and has given of himself in many ways. One example of this is his recent giving of his time and talents to volunteer for a Rebuilding Together (formerly Hearts and Hammers) project organized by our father and members of our family's church.

I would agree that Brian made a huge mistake back when he was in college, but I truly believe he has learned his lesson and grown from this mistake. He truly is a good person and I feel that any harsher punishment such as jail time would bring him down. He has shown himself to be an important family and community member and through this I feel he has grown closer to God as well. Also, the business he has worked hard to establish, as well as his many customers, would suffer significantly if Brian were not able to continue his work at the capacity he is now.

I ask that you please consider these thoughts when making your final decision in determining Brian's future. Thank you for your consideration.

Sincerely,

/s/ Kerri Hanna
KERRI HANNA AND FAMILY

630 South 10th Street
Eldridge, IA 52748
April 26, 2005

Judge Pratt
US District Court
Southern District of Iowa
110 East Court Avenue
Room 127
Des Moines, IA 50309-2052

RE: BRIAN GALL

Dear Judge Pratt,

Brian Gall is a good man, but made a stupid mistake 5 years ago; he was a college student, living with bad influences. He got out of this bad situation, and realized on his own, it was wrong and didn't want to be involved. Jail could destroy this human being Brian is becoming.

Since knowing his act was wrong and wanting to change his ways, Brian has grown as a responsible important person to our society. He went from a college kid to a fine adult who wants to do the good things in life. We all make some bad choices in our life, but shouldn't something be said for someone who tries to fix the bad choices, which is what Brian has done.

Brian is paying the price for his mistake everyday since the law has been involved. All this time and money, has taken a toll on him and all whom love him, wondering what is going to happen, and all along he is still trying to be positive about this and trying to make a good life for himself. He isn't sitting around waiting for a decision; he is trying to reach his goals, and hoping that the courts will have mercy on him.

Brian comes from a well-balanced loving Christian family. I am his aunt, and I believe he is truly sorry. I am letting him live with my daughter in Iowa City at our house. I would not

jeopardize my daughters safety for anyone or anything, but because I know Brian is a different person and has really changed his ways I am letting Brian live there to help him out, and to be with loved ones. My daughter and Brian are very close. She is attending Iowa right now. They have been good for each other during this ordeal.

Brian, as long as I can remember has told me he wanted to own his own business. He knew he needed a college education, and graduated with a degree. He started his own business. By talking with Brian you can see his excitement in how his company is growing already. There are a lot of people counting on Brian to provide his services in the construction business. My husband has had chances to work with Brian and told me that he is a very hard, knowledgeable worker.

He knows he is forgiven by God and is trying to be the best he can be. We are all sinners, but God forgives us all if indeed we are truly sorry for our mistakes. Brian has all the love and support from his family. We are all praying that the courts will see that Brian is truly needed by the community and his family and friends and it would not serve any purpose to send him to jail.

Respectfully,

/s/ Cheryl A Meyer
CHERYL A MEYER
Brian's Aunt

May 15, 2005

Judge Pratt
US District Court
Southern District of Iowa
110 East Court Avenue
Room 127
Des Moines, IA 50309-2052

Dear Judge Pratt:

RE: Brian Gall

I am writing in reference to the upcoming sentencing hearing for my son, Brian Gall on May 27, 2005.

I am asking for leniency in Brian's case. I see no advantage to putting him in jail; he has made the changes in his life to be a better person for himself and for society. I believe it could do more damage by putting him in jail for something that happened five years ago and for such a short time. He has started his own business and it is really starting to take off. By putting him in jail at this point I believe his business will suffer and very possibly fail. People are counting on him to do jobs for him. He now has two employees that also count on him for work. Isn't what society really wants Brian to do is to change his life for the better?

He has changed his life. This was a short term college event. He decided on his own to change and did not want to continue with that life choice. He graduated from college and moved to Arizona and then to Colorado to get distance from the situation and bad influences to start a new life. When this situation came to a head last June, he came back home to Iowa to have the support of family. Up until that time he had some apprehension about going full force into starting his own business. Once he came to Iowa he decided to make a go of it and he is doing fantastic. He loves what he is doing and shares his business with us with excitement. He chose Iowa

City instead of his hometown in the Quad Cities because his girlfriend is in Iowa City. He is 45 minutes from his hometown so we see him often. He has been on probation for almost a year and I believe he has had good reports and has been cooperating with the authorities completely. He has been putting off some major decisions about his life in the past year because of this situation not being settled.

He has the support of family. We love him very much. We know what he did was stupid and he also knows it was stupid, and we were very naïve not knowing it was happening as I am sure many parents are. But it did happen. He is trying to put the whole episode behind him and move on. I pray the courts to have mercy and allow him to do this. I beg you to let Brian continue on with his life to be successful and an asset to society instead of allowing a jail sentence which could very well destroy his business, self esteem and the person Brian has become today.

Sincerely,

Vicki Gall
Brian's Mother

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

No. 4:04-CR-116

UNITED STATES OF AMERICA,
Plaintiff,

vs.

BRIAN MICHAEL GALL,
Defendant.

SENTENCING TRANSCRIPT

Courtroom, Second Floor
U.S. Courthouse
123 East Walnut Street
Des Moines, Iowa
Friday, May 27, 2005
1:35 p.m.

BEFORE: THE HONORABLE ROBERT W. PRATT, Judge.

APPEARANCES:

For the Plaintiff: JASON GRIESS, ESQ.
Assistant U.S. Attorney
U.S. Courthouse Annex
110 East Court Avenue, Suite 286
Des Moines, Iowa 50309-2053

For the Defendant: MARC MILAVITZ, ESQ.
Marc Milavitz Law Office
1733 Canyon Boulevard
Boulder, Colorado 80302

KELLI M. MULCAHY - CERTIFIED SHORTHAND REPORTER

[2] INDEX

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
For the Defendant:				
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[3] PROCEEDINGS

THE COURT: Please be seated.

Good afternoon.

Mr. Gall, have you had the opportunity to read the report in this case?

THE DEFENDANT: Yes, I have, sir.

THE COURT: And did you have enough time to talk to your lawyer about the report?

THE DEFENDANT: Yes.

THE COURT: You can remain seated.

THE DEFENDANT: Yes, Your Honor.

THE COURT: Mr. Milavitz, did you have the opportunity to read the report in this case and talk to the defendant about the issues before me here?

MR. MILAVITZ: I did, Your Honor, yes.

THE COURT: All right. Mr. Milavitz, you wrote—I wanted to make sure I had the facts down here. I have your objection letter, which came on the 19th of May. I notice that paragraph 59, you say—I'm referring to your letter of May 19th, you say, paragraph 59, "Mr. Gall lived in Mesa, Arizona, for approximately one year, not three months." That has not been changed. How long did he live there?

MR. MILAVITZ: He did live there for one year, Your Honor.

THE COURT: Okay. And then—

[4] MR. MILAVITZ: I'm sorry to interrupt. It's one year and three months.

THE COURT: One year and three months?

MR. MILAVITZ: Yes.

THE COURT: Okay. And then on the paragraph 84, you say, under "Home Mortgages," that, "This is a vacation home in the Lake of the Ozarks which Mr. Gall owns along with five others." You say he contributed a relatively small amount of money. What's his equity in the place?

MR. MILAVITZ: I do believe it's about $2,500, Your Honor.

THE COURT: And then lastly, you say, paragraph 85, personal liabilities, "You omitted a personal loan Mr. Gall owes his parents." Is that 25,000 for legal expenses?

MR. MILAVITZ: Yes, Your Honor.

THE COURT: Okay. I didn't see anything in Ms. Dassinger's summary about his assets and liabilities. Is he paying that back?

MR. MILAVITZ: The $25,000?

THE COURT: Yes.

MR. MILAVITZ: Your Honor, he has not started to do that. That was something that was between he and his parents that he was going to determine— I mean, I guess if he goes to prison, it would be very difficult for him to start paying that back.

[5] THE COURT: Right. Is he going to pay it back?

MR. MILAVITZ: Yes.

THE COURT: Okay. Thank you very much. Mr. Griess, have you read the report in this case?

MR. GRIESS: I have, Your Honor..

THE COURT: All right. Mr. Griess, from the Government's standpoint, can you tell me, are there any factual issues I have to resolve?

MR. GRIESS: I don't believe so.

THE COURT: All right. Mr. Milavitz, do you know, from the defendant's standpoint, are there any factual issues I have to resolve?

MR. MILAVITZ: From my read, Your Honor, of what I wrote to the probation department and the changes I think were okay, except for the same issue of this alias— Again, I asked Mr. Gall about this alias, and he had no idea why the Iowa Department of, I guess, Public Safety, or whoever the law enforcement people, have this down on his records as having an alias. He's never gone by any other name.

THE COURT: All right.

MR. MILAVITZ: So we're thinking that that's maybe a mistake on their part.

THE COURT: All right. Mr. Milavitz, I read—talking about the age of the defendant here, I read of his substance abuse treatment, which—treatment problem, which apparently has [6] gone on for a long time, and I didn't see any reference to the treatment that he had, I believe the record reflects, in March of 1995 while he was in high school. I asked Ms. Dassinger about that. She had no records involving that. Does he have a juvenile record?

MR. MILAVITZ: Your Honor, not that he is aware of, no.

THE COURT: Okay. Why did he get ordered to treatment at age 16?

MR. MILAVITZ: Your Honor, when Mr. Gall was 16, he was involved in an automobile accident, and under the zero tolerance law, I believe, of the state of Iowa, he had some

alcohol in his system, and, as part of that, he was ordered to undergo treatment.

THE COURT: By?

MR. MILAVITZ: By the courts, I guess. I don't think that it resulted in him having a record. I believe he just had to undergo that treatment.

THE COURT: Okay. Mr. Gall, I have a hard time concluding. When did you meet Mr. Rinderknecht?

THE DEFENDANT: In February of 2000 or—

THE COURT: Okay. The report tells me he came to your apartment in '98 and '99 and on six occasions brought cocaine, which he shared. When did you meet Mr. Rinderknecht?

THE DEFENDANT: I met him in February—within a month [7] or two of February of 2000. I— He was dealing with other people in my apartment, but there was a lot of people going in and out, and—

THE COURT: Well, is the report wrong?

THE DEFENDANT: Was he in my house? He could have been.

THE COURT: No, no, no. Did people in your house share cocaine with Mr. Rinderknecht on six occasions in '98 and '99?

THE DEFENDANT: Not that I know of.

THE COURT: Ms. Dassinger, is that from discovery?

PROBATION OFFICER DASSINGER: That's from discovery, sir.

THE COURT: Mr. Griess, do you know anything about this defendant's involvement in '98, '99 that's contained in the report?

MR. GRIESS: Your Honor, without looking specifically at what Mr. Rinderknecht said, I do recall Mr. Rinderknecht discussing the fact that he had general knowledge of the group of individuals that lived at a house that I believe Mr. Gall was also residing at, and that, in addition to small quantities of Ecstasy and user quantities of cocaine—-or I guess those two drugs he would sometimes deliver to that residence for that use and for the group's use.

THE COURT: Okay. Now, Mr. Griess, you can tell me, [8] because you've got extensive knowledge of the case, more than I do, even though I heard the testimony during Mr. Cortez Sr. and Mr. Crawford's trial.

I asked Ms. Dassinger this. When one sells Ecstasy, do you sell it in quantities— The report doesn't tell me this, and that's why I think I need to know this. Do you sell it in quantities of two or three, if you are a seller to a consumer? Do you sell it in five or ten, or how many Ecstasy pills, if you're a dealer, do you sell to a user?

MR. GRIESS: If you're selling to a user, Your Honor, I mean, the answer is it could vary, the ranges, if you're selling to a user.

For instance, in this case, there was discussion in the facts that sometimes the individuals who were selling would go to bars and they would sell pills for anything from 20 to 30 dollars a pill at a local bar. In addition to that, the people who were charged and convicted in federal court were selling to people who were then also selling.

THE COURT: Right. But those were dealers that you prosecuted when—You know, there are a whole bunch of pills in this case, and I'm trying to think in my own mind, I know the marijuana equivalency is 87 kilograms, and the numbers just get away from me when you talk about the numbers of pills.

But from a dealer to a user, what you're telling me is it can be anywhere from two to three to ten?

[9] MR. GRIESS: Certainly. Absolutely.

THE COURT: All right. Thanks very much. Mr. Milavitz, do you want to put on some evidence? My law clerk said that you had intended to.

MR. MILAVITZ: I do, Your Honor. Both of Mr. Gall's parents, Tom Gall and Vicki Gall, would like to make statements to the Court, if they could, please.

THE COURT: All right. You may proceed.

MR. MILAVITZ: Thank you very much. I'm going to call Tom Gall, please.

Would the Court prefer me to stand at the podium or back here? It's going to be mostly a narrative statement.

THE COURT: Oh, he's going to make a statement or give testimony?

MR. MILAVITZ: Just— Well, make a statement, and I've never done a sentencing in this court so I don't know how you wish—

THE COURT: Well, I prefer the lawyer to be at the podium and the witness in the chair.

MR. MILAVITZ: That's fine.

THE COURT: Okay. And, Mr. Milavitz, you've never had the idiosyncrasies of me—Mr. Griess has had to tolerate me—but I prefer you refer to the witnesses by the last time when we're having fact-finding proceedings.

MR. MILAVITZ: Thank you very much, Your Honor.

[10] TOM GALL, DEFENDANT'S WITNESS, SWORN.

THE COURT: You may proceed, counsel.

MR. MILAVITZ: Thank you very much.

DIRECT EXAMINATION

BY MR. MILAVITZ:

Q. Could you please state your name.

A. My name is Tom Gall.

Q. Mr. Gall, where do you reside?

A. I live in—at 84 Park View Drive in Eldridge, Iowa.

Q. And are you related to Brian Gall?

A. Yes, I am. His father.

Q. Are you related to Brian Gall?

A. Yes, sir.

Q. How are you related to him?

A. I'm his father.

Q. Did you wish to make a statement to the Court today. regarding the sentence that Brian Gall should receive?

A. I do.

Q. Could you please make that statement at this time.

A. I will.

THE WITNESS: Your Honor, I know that what Brian did was wrong. It was very wrong. I've seen the change he's made in his life. What he did made me mad. I'm ashamed of the fact that what he did was very wrong, but he realizes that, I know he does, and I've seen the changes he's made.

[11] He's started his own business. He's doing very, very well. He's got people that rely on him now. He's grown to the point where he's supporting a couple of employees. He's got contractors that count on him for his expertise.

And I know that what he's done shouldn't go unpunished, but I would ask that you let him continue to work at his business. I think he's a greater asset to the community than—in this—in his job and his work that he does, and just—just the fact that a lot of people depend on him.

As family members, of course, we would be devastated. He's got a young lady that's—he's very involved with and loves very much. And I'd just—I'd just hate to see him go to jail at this time, Your Honor.

THE COURT: Okay.

BY MR. MILAVITZ:

Q. Mr. Gall, I want to touch on a couple of other issues, if could, please. One is the issue of the loan that Brian Gall has from you. How are you employed, sir?

A. I'm a mechanic for the Pleasant Valley Community School District in Pleasant Valley, Iowa.

Q. And your wife, how is she employed?

A. My wife is a secretary for the Scott County Extension Service, a part-time secretary.

Q. And in making this loan to Mr. Brian Gall, do you expect or need that loan to be repaid from him?

[12] A. I definitely need that loan to be repaid, and I expect it to be repaid.

Q. This was not a gift to him?

A. It's not a gift.

MR. MILAVITZ: I have nothing further. Thank you, Your Honor.

THE COURT: Mr. Griess?

MR. GRIESS: I have no questions.

THE COURT: You may step down.

(Witness excused.)

MR. MILAVITZ: Your Honor, I would next call Ms. Vicki Gall.

VICKI GALL, DEFENDANT'S WITNESS, SWORN.

DIRECT EXAMINATION

BY MR. MILAVITZ:

Q. Could you please state your name.

A. Vicki Gall.

Q. And where do you live, Ms. Gall?

A. 84 Park View Drive in Eldridge, Iowa.

Q. And are you related to Brian Gall?

A. Yes, I am.

Q. And are you his mother?

A. Yes.

Q. Ms. Gall, you and Mr. Gall have made a loan to Brian for the purposes of legal representation; is that correct?

[13] A. Yes, we have.

Q. Do you expect or need that loan to be repaid?

A. Yes, we do.

Q. Can you please tell the Judge why.

A. Well, because I don't think we should just, you know, let him have free money and be able to just—I don't know, to pass this off and figure—you know. Plus, you know, it was quite a bit of money, and we took it out of some savings, and we need to have it back.

We've told him to wait until he—In case he did go to prison, he would have to—somebody would have to pay his

bills at the time, so we didn't push him, but as soon as this is over, he will have to start paying us back.

Q. Would it put you in a financial bind if that loan was not repaid?

A. Yes

Q. Ms. Gall, you've asked to make a statement to the Court today regarding Mr. Brian Gall's sentence. Can you please make that statement at this time.

THE WITNESS: Brian—Your Honor, Brian, I think, you know, I believe he realizes and we know he made a stupid mistake. It was very stupid. He's probably one of the first ones to tell you that. But I do believe that he's really learned from it.

In the last year since we've been going through all [14] this, we've had a lot of support from family and friends, and we've watched him grow. He comes from a loving and Christian family, and I think some of those values are coming back now, and, you know, he's become more mature and grown up.

And I just think at this time that, you know, if he went to jail, a lot of things could mess up for him in his life, you know, his business. And I just don't see any value in putting something—someone in jail that is already making those changes, which is what, I believe, the system would want him to do anyway, is to make those changes.

MR. MILAVITZ: Thank you very much.

THE COURT: Mr. Griess?

MR. GRIESS: No questions.

THE COURT: You may step down.

(Witness excused.)

MR. MILAVITZ: Your Honor I have a statement to make. It's more of a legal argument than anything else, just to add a few touches to what I've already filed with the Court.

THE COURT: All right.

MR. MILAVITZ: And I know that Mr. Gall wishes to make a statement to the Court too, and I don't know which order you want to have—

THE COURT: I have the defendant allocute after I hear from you about what the appropriate sentence is and after I hear from the Government what they think the appropriate [15] sentence is. Then I let the defendant make his allocution.

MR. MILAVITZ: Thank you very much, Your Honor. Your Honor, in preparing for this hearing today, I've done a lot of thinking on how best to approach the Court regarding Mr. Gall, and I think there's only one way to do that, and I think what the Court—what we're asking the Court to do is to look at the totality of circumstance of Mr. Gall's life.

I believe—and although it may not fit under the pure statutory interpretation as found in the U.S. Sentencing Guidelines of 5K2.20 regarding aberrant behavior, I believe that this incident or these series of incidents for three months out of Mr. Gall's 26 years were aberrant behavior.

I have seen everything and talked to Mr. Gall, his family, his friends, his girlfriend, and from what everybody has told. me and I think what's evidenced from the letters that the Court has received—and those people know Mr. Gall far better than I do and far better than, you know, you do, because you've only seen him very little—I think that shows that Mr. Gall is basically a very good person. He's a responsible person. He's a positive member of our community.

He's somebody who is definitely not in need of rehabilitation because he's done an admirable job of rehabilitating

himself. This is a circumstance where you're looking at a three-month window of his life.

[16] THE COURT: Counsel, I've got to tell you, I don't know where it says three months. My report says seven or eight. Does yours say three?

MR. MILAVITZ: I believe that he was involved in the from about June through August or—

THE COURT: Mine says seven or eight. Where does ii say three months?

MR. MILAVITZ: If I could just have a moment.

Your Honor, I believe my three months came from the actual discovery where he was mainly in the business—

THE COURT: Well, I'm operating on the facts that I deem not to be in dispute. My report says March to September.

MR. MILAVITZ: I believe in March—I believe that under the discovery, the things that I've read, I think that was only through the summer of 2000 is when he really became active in the business of dealing drugs I believe up until that time, he was—he was—

THE COURT: Here's what paragraph 5 says, counsel. There's Attachment A, Stipulation of Facts, which states that, "Beginning on or about February of 2000 and continuing to on or about September of 2000, Brian Michael Gall voluntarily entered into an agreement or understanding with others to distribute MDMA. "

That's a fact. Are you telling me it's not true?

MR. MILAVITZ: No, I'm not, Your Honor.

[17] THE COURT: Okay, So I'm going to accept that he was involved distributing this drug from February to September.

MR. MILAVITZ: And I will accept what's written there, Your Honor.

THE COURT: Okay.

MR. MILAVITZ: And I stand corrected, then. I guess what I was thinking of is when he was—when the volume picked up, and that's when—

THE COURT: Well, the only thing I know is what you and Mr. Gall and the Government agreed to. You agreed that he was involved distributing from February to September, so I wasn't prepared to come here and hear that it was three months when it's not.

MR. MILAVITZ: And I don't mean to take issue with the Court. We'll stand by that stipulation, Your Honor.

THE COURT: Okay.

MR. MILAVITZ: I think the—I think that even if you look at it from that time period, it is a small window in Mr. Gall's life, and it was at a point when he was in college.

And I think that when the Court— What's happening here is that Mr. Gall, by taking this plea bargain and taking this plea, is saying, "I'm guilty of a felony. I'm stepping up to the plate here." And I believe that that fact, in and of itself, at such a young age of only being 26 years old, the consequence of even having a felony conviction on one's record [18] at that time, and it's going to follow him throughout the remainder of his life, is a very severe consequence, and it's a weighty consequence that's going to follow Mr. Gall, and I believe that that shows great responsibility and acknowledgment of the punishment that's occurring just by that fact alone.

I honestly can come to the Court today and I can tell the Court from what I've seen of Mr. Gall from his behavior before this window of time and his behavior—and especially, more telling, probably, his behavior since this window of

time, I believe that there is very little danger of a future harm, either to the community or to anyone else.

Mr. Gall's behavior has been law-abiding. He's left that life behind. He left that life behind over four years ago, almost five years ago now, and he's basically done what we all need to do, which is to follow the law, and he's done that.

I don't believe he's any future threat because of words that I have just stated, nor do I believe there's any need of rehabilitation for Mr. Gall. Mr. Gall has self-rehabilitated himself, and from my experience, I think that's the exception, not the rule.

My practice is mainly criminal defense, and I have two—my two biggest problems with my clients are, number one, acceptance of responsibility and reality, which I think is always a large hurdle to overcome in a lot of instances, and also the fact that, quite frankly, these people's lives are a [19] mess, and they need some help. And they're gonna get it through the system one way or another, but they need some help.

And I think in Mr. Gall's case, neither of those two factors are present. I think that he has rehabilitated himself through the help, obviously, of his own character, as well as through his friends and his family, and I think that he has acknowledged the consequences of what he did.

Can you imagine, Your Honor, some—a federal agent coming to your home three years down the road after you've left college and you thought you've left that life behind and asking you if you were involved in this activity during this time period? And Mr. Gall nodded his head in acknowledgment that he was.

Regarding the issue of disparity in sentencing, I know that the Court has sentenced every other person that's been involved in this case to a prison sentence, and so the Court

may be thinking, "Well, why is Mr. Gall different? Why should I not give him the same type of sentence that I gave the other people? Why should Mr. Gall skate with probation?"

I think the answer is this: I think Mr. Gall can be differentiated from the other people that are involved in this case quite simply by the factors that I enunciated to the Court; his withdrawal from the conspiracy, his lifestyle that he's lived since that time.

I think those two factors are key to the Court being [20] able to say, "I can see why that this individual should be treated differently than the other individuals that have come forth in this court and been sentenced."

Most of those individuals were still in the practice—in the business and still involved in illicit activities when they were caught by the Government. Mr. Gall was not. Mr. Gall had long ago left that life behind and was not doing what they were doing.

It's not very often, Your Honor, that in my experience, and I'm just giving you my experience, when I deal with conspiracy cases that I've had somebody who's been charged three years after the fact after withdrawing from a conspiracy.

There is no restitution in this case, obviously. I think there are a number of other factors that factor in to Mr. Gall being—having an appropriate sentence of probation. There are others who are depending on Mr. Gall. There's his family, who are depending on him, obviously, but, as I stated in my memo to the Court and in my motion for downward departure, he has two employees. They're contract employees; however, they do depend—they work pretty much exclusively for Mr. Gall. They don't work for anybody else.

Mr. Gall's business has grown to the point where the manager of Pella windows for the state of Iowa recently contacted him, I believe either yesterday or today, and wanted to use him exclusively as an installer. That's—- And if that [21] would occur and he would have contracts that would extend indefinitely into the future, more employees would be taken on.

As it is right now, Mr. Gall has two people that work for him on an exclusive contract basis, and he has contracts that he's right in the middle of that he's waiting for windows to arrive that he believes will take him another month to finish those jobs.

He's got contracts that are out on bids to get him enough work through—and his company enough work and his employees enough work through the end of the summer, and that could even go on, if the Court places him on probation, because of this issue now with Pella windows. That's the kind of person they think of Mr. Gall.

And I know that the Court's seen the letters from his employers or the people he contracts with as well as from his employees. So I think that there is a dependence - -

THE COURT: Counsel, let me interrupt. I'm looking at paragraph 89. It tells me that in '03 he earned $27,000. What did he earn last year?

MR. MILAVITZ: Your Honor, I'm not sure. If I can have a moment.

THE COURT: Please.

MR. MILAVITZ: Your Honor, Mr. Gall believes, based upon his recollection of his taxes, he earned approximately in the mid-twenties, 24, 25 thousand.

[22] THE COURT: Okay. And having been self-employed, I know it fluctuates. What's he earn now, if he's doing so well? What are his earnings monthly or weekly?

MR. MILAVITZ: If I can ask, Your Honor.

THE COURT: Yeah.

MR. MILAVITZ: He believes his gross income, Your Honor, is somewhere in the neighborhood of 5 to 6 thousand, and he believes his net income after paying his employees and for expenses, 2 to 3 thousand dollars.

THE COURT: A month?

MR. MILAVITZ: A month.

THE COURT: Okay. Thanks very much.

MR. MILAVITZ: Sure. Just touching on some other factors that I believe Mr. Gall would be an appropriate candidate for probation is his lack of need for rehabilitation, as I've stated to the Court, his compliance with authorities.

When the agents came to discuss this matter with him, he complied. When I was first brought into this case, Mr. Gall, as you know, was living in Colorado, and that's how I got involved, and when I spoke to the—Mr. Griess and to the, you know, U.S. Marshals and arranging his surrender, he voluntarily came back to Iowa. There was not a problem with him at all.

And he's had an excellent record of pretrial release. [23] Since he's been back, he's done everything that's been asked of him. There's been all clean drug tests, and there has been no problems at all that I'm aware of. And I don't know if Court is, but I'm sure that if there would have been it would have been brought to the Court's attention, as well as my attention.

So one can conclude from that that he has done everything, and I know that the Court is aware that he's made all of his court dates and there's never been an issue with that.

THE COURT: All right.

MR. MILAVITZ: I know that the Court can depart on its own motion, and I know that since Booker there's an issue of if the Court even needs to downward depart to do that, but I think that that's an issue that I wanted to touch on very briefly that Mr. Gall did cooperate with the Government, that when he was asked to come in and debrief, he did so.

And we knew going into that whole situation that it was totally up to the Government's discretion if they were going to file a 5K1.1 motion or not. And even knowing that,—And I also let Mr. Gall know that it's been my experience that people who go in and speak to the Government and then go to prison oftentimes are placed in a very difficult situation by fellow prisoners.

[24] Knowing all those issues, Mr. Gall still decided to voluntarily go in and speak to the Government, and I flew in specifically from Colorado, and we spent, I believe, an hour or two with the agent, and I believe that Mr. Griess was present during part of that—during that interview.

I believe that federal law—And I want to cite the case of U.S. v. King, 53 Fed. 3d 559. There's some language in there that states that the Court must evaluate an individual's cooperation on an individual basis and cannot engage in a mechanical reduction.

So I believe that there is sufficient case law out there that does allow the Court, on its own motion or if it believes it's the right thing, to determine, even if the Government doesn't file a 5K1.1, to downward depart based upon that.

THE COURT: That's not the law in our circuit.

MR. MILAVITZ: I understand, Your Honor, but I believe other circuits have recognized that.

THE COURT: In fact, I think most of the post relevant conduct, the Government would claim is already given credit to the defendant by acceptance of responsibility. I don't mean

to make their argument for them, but at least that's been my experience.

MR. MILAVITZ: I understand.

THE COURT: You're claiming that this is an [25] extraordinary acceptance of responsibility?

MR. MILAVITZ: I think that under the King case, Your Honor, that's where the Court said that the Court should not just indulge in a mechanical three-point reduction for acceptance of responsibility and go beyond.

THE COURT: And what circuit is that from?

MR. MILAVITZ: That is from the Third Circuit, Your Honor, in 1995.

THE COURT: Okay.

MR. MILAVITZ: I think that one of the other things—when I was preparing for this hearing, the thing that I had to keep coming back to is that Mr. Gall falls under the guidelines from 2000, not from today's date, and back in 2000, especially pre-November of 2000--

THE COURT: Actually, Ms. Dassinger I believe her report shows that she used the '99 guideline.

MR. MILAVITZ: I guess that the point that I'm trying to make is that up to November of 2000, the Sentencing Commission allowed for a larger number of departures, a larger area for departures, and some of the larger areas of departures that I want to address very briefly with the Court are super-acceptance of responsibility, which I believe applies in this case; extreme remorse, which I think definitely applies in this case; post-offense rehabilitation, which certainly applies in this case; and a voluntarily—and probably one of the most [26] significant ones is a voluntary cessation of criminal conduct before the discovery of the crime..

And this is a Tenth Circuit case, so I'm kind of hometowning you from my circuit, Your Honor, but there is a case called *U.S. v. Nunemacher*, N-u-n-e-m-a-c-h-e-r, and that cite is 362 Fed. 3d 682, and that's actually a Tenth Circuit case from 2004. And there, the Court did find grounds for downward departure for voluntary withdrawal or cessation of criminal activity before, and I think that's significant in Mr. Gall's case.

And I think, finally, one final area where the Court can downward depart is the fact that Mr. Gall has engaged in exceptional charitable and community activities and good works, and for that proposition, I cite to the *Court U.S. v. Cooper*, 394 Fed. 3d 172, another Third Circuit case.

Obviously, the Court can .tell I like the Third Circuit, because I think that they're very generous with their downward departures.

But I think that in this instance, Mr. Gall has done a lot since he's been out, as noted in the letters to the Court. He has donated his time and his expertise to charitable causes, specifically working on low-income and moderate-income housing projects.

And given the fact that Mr. Gall is extremely busy running his own business, where he's basically working at least [27] six days a week, I find it extraordinary that he can take his only day off of the week and do this type of work. I think that's commendable for Mr. Gall.

So under the totality of the circumstances, Your Honor, I believe there are significant areas for downward departure from the guidelines. And I understand that the guidelines are only advisory at this point; however, I do believe that most courts, and I'm sure this Court does too, still relies and uses them as a benchmark, probably, to start with. I don't mean to be presumptuous. I mean just that's been my experience so far in federal courts since Booker.

But I do believe that even if the Court—I do believe that the Court can look at the individual, can look at Mr. Gall as the individual, and if it looks at Mr. Gall, the totality of what Mr. Gall is, what he's done and where he's at now weigh heavily in favor of not incarcerating Mr. Gall but, rather, placing him on probation, allowing him to continue to be a positive and vibrant member of our society.

And I know that Mr. Gall— I guess we'll wait for Mr. Griess. Thanks very much.

THE COURT: Right. Thank you.

Mr. Griess?

MR. GRIESS: Thank you, Your Honor.

I think it's always difficult after the Booker decision to consider the interplay between the downward departure motion and the Court's discretion that it now possesses with regard to 3553(e), but I will go ahead and discuss the downward [28] departure issue just briefly, and I think the best way to do this is just with regard to the general subject matters defense counsel cites for reasons for a departure.

First of all, with regard to age, of course, under the policy statement that the defendant did cite, age is not ordinarily relevant. I would point out to the Court that the defendant's age is very similar to other people in this case. I don't think that there's anything about his age that is so extraordinary that in and of itself would require a departure from the Court.

With regard to his voluntary withdrawal from the conspiracy in this case—And the Government did stipulate to this, because the evidence that it possessed is that that is what occurred, but I do think the Court needs to understand that the defendant is already receiving a significant benefit from the fact that he did voluntarily withdraw.

Because he voluntarily withdrew before the guidelines changed for MDMA or Ecstasy, he was sentenced at a much

lower conversion weight. In 1999, the guidelines that are in effect for today are 1 gram of MDMA equals 35 grams of marijuana. The conversion ratio that everyone else in this case will face is that 1 gram of Ecstasy equals 500 grams of marijuana, or 14 [29] times that conversion quantity that the defendant faces.

So the fact that he did voluntarily withdraw, he's already receiving a significant benefit for that, and I'll talk more about that in a little bit.

With regard to the three-month—or what the defendant characterized as a three-month period of an involvement and what I think the Court also realizes was a little bit longer than that, essentially from late winter or early spring of 2000 into the end of summer, or just before Mr. Gall returned to school at Iowa State, he was involved in the distribution of Ecstasy, smaller quantities at first, and then it picked up to much larger quantities as the summer went along.

The reason I believe this is already being taken into account, Your Honor, is the fact that he's only being accountable for those pills that he dealt with at that time. As the court, knows, the law of conspiracy is that he could be held accountable for what was foreseeable, but because he withdrew from the conspiracy, in accordance with the law, he's only held accountable for that.

So indirectly, he's already receiving a benefit from the relatively small period of time he was involved in this case from the other defendants who were involved.

With regard to cooperation with the Government, the Court, I think, has already noted what the correct standard in the Eighth Circuit is with regard to when the Court can depart, [30] but to the extent the Court would consider this as something under 3553(a) that needs to be taken into consideration in arriving at the defendant's sentence, I would

just say that, number one, as the Court noted, he has already received acceptance of responsibility.

Number two, what the law requires of the defendant is to provide substantial assistance, and while he did debrief and cooperate, he did not substantially assist the Government in the prosecution of others, through no fault of his own, but the simple fact of the matter is that when he provided the information, the individuals he knew about and could talk about had already either confessed and were cooperating themselves or were not individuals who the Government was pursuing at that time.

I am not aware of any substantial risk to the defendant's personal safety as a result of his cooperation because, like I say, everyone he talked about has also already cooperated.

The last thing and, I think, the most important thing that I think needs to be taken into consideration by the Court, and I'm going to talk about this in a minute—I'm going a little out of order here—is the fact of the matter is it's not that he came in and cooperated and gets no benefit. He does receive a benefit. He gets safety valve. Because he is required under those provisions to truthfully debrief and [31] provide information, and because he did that, he receives an additional two levels off of his sentence.

And so I think he is receiving credit for his—already for his cooperation to the extent he did cooperate and provide truthful information. And just so it's clear for the record, the Government did not use any of Mr. Gall's information in the prosecution of another individual in this case or any other.

With regard to aberrant behavior, quickly, and, once again, this is no longer incumbent or required by the Court, but the guidelines do indicate that in order to qualify for aberrant behavior, the crime had to be committed without significant planning and be of limited duration, specifically only if the

defendant committed a single criminal episode, occurrence, or single criminal transaction.

That obviously is not the case here. There was significant planning, up to and including a meeting whereby a group of individuals discussed how they were going to proceed at a certain point in the conspiracy just prior to the two 5,000 shipments—5,000-pill shipments of Ecstasy that occurred.

It was not a one-time occurrence, it was multiple transactions, and for those reasons, under the law or under the guidelines section 5K2.20, the defendant does not qualify for aberrant behavior or a reduction for aberrant behavior.

Turning to the factors in the 3553, Your Honor, I [32] think it's important for the Court to contemplate on the seriousness of the offense, obviously, to promote respect for the law and provide just punishment for the offense.

Essentially, what occurred in this case is in February of 2000, Defendant hooked up with Luke Rinderknecht, who at that time was living in Central College—or in Pella, Iowa, going to Central College in Pella, Iowa. There were small, I believe one- to two-hundred-pill, purchases being made at that time by Mr. Gall from Mr. Rinderknecht.

After a period of time—or after he graduated, actually, Mr. Rinderknecht was going to move to California. He met with other individuals in the conspiracy, Mr. Gall and Mr. Sauerberg, and then a plan was developed about how they were going to continue to sell drugs when Rinderknecht left. Specifically, Rinderknecht would mail them to Sauerberg, Sauerberg would provide the pills to Gall, who would. then distribute to other individuals. Gall would provide the money back to Sauerberg, and the money would then go back from Sauerberg to Rinderknecht. That's how this conspiracy worked with regard to this group of people.

The people Mr. Gall stipulated to selling Ecstasy to, I think this is significant, because the Court needs to be cognizant of the fact of what the other individuals received for sentencing. Mr. Harbison, who was the customer of Mr. Gall's, received a 30-month sentence; Mr. Gooding, who was [33] a customer of Mr. Gall's, received a 35-month sentence; and Mr. Coleman is actually still pending sentence.

However, in approximately September of 2000, Gall did decide to cease his activities and the involvement in this case and, in fact, communicated that fact both to Mr. Rinderknecht and to at least one of his customers, I believe it was Mr. Coleman.

There were two large-quantity shipments of pills that Mr. Gall's being held accountable for in this case, Your Honor Those were the two 5,000-pill shipments. I take issue a little with the fact—with the idea that these are small to medium quantities. The fact is that's 10,000 pills, which, no matter how you look at it, is not a small quantity.

I think this is especially true when you consider that Mr. Gall profited 30 to 40 thousand dollars as a result of, his involvement in this case. I think that also needs to be considered by the Court when considering whether this is just a one-time product of some misguided youth or a real serious criminal offense, which it clearly is.

THE COURT: Mr. Griess, come back to where you are, and I apologize for interrupting, but I was writing as you were telling me, and looking at my report as well. You told me two other defendants, and I have my report here, and on page 1, you told me Harbison, and I couldn't write quick enough. You said 30 months, and then you named another defendant, whom I didn't [34] hear, and you said 35 months.

MR. GRIESS: That's correct. His name is Mr. Gooding.

THE COURT: Gooding, okay. Now, these are not listed on the report as other co-defendants. That's the reason I didn't have it. They're not listed as co-defendants or related cases, but they are?

MR. GRIESS: They are, Your Honor. And you can see, if you would look at the plea agreement in the case, that these are the individuals who the defendant was supplying with MDMA.

What happened in this case, Your Honor, and the reason probably why those aren't included, is the investigation occurred over time whereby one individual was arrested, he pointed to another individual, who pointed to another individual, and they went right up the chain to the top.

Now, when those last people in the conspiracy, were charged, including the suppliers for Ecstasy and cocaine, the remainder of the people who hadn't been approached early on 'were also charged.

So Mr. Gooding and Mr. Harbison, along with some other individuals, a person by the name of Dryer, I believe one other possibly, were convicted along the way. And I did confirm this morning through electronic filing system that those were the sentences that they did receive.

THE COURT: That must have been somebody other than [35] me. I don't remember those defendants.

MR. GRIESS: That's very—could be the case, Your Honor.

THE COURT: All right.

MR. GRIESS: In fact, I believe it was Judge Longstaff.

THE COURT: Okay.

MR. GRIESS: The last point I was making, Your Honor—

THE COURT: Before I get off that, how long did they stay, if you remember—You probably know more about this case than anybody. How long did those two stay in the conspiracy, and did they voluntarily withdraw?

MR. GRIESS: They did not.

THE COURT: They did not?

MR. GRIESS: They did not voluntarily withdraw. And they were in the conspiracy, I think, for a shorter period of time, but at the very end.

THE COURT: Okay. Thank you.

MR. GRIESS: A significant difference there, Your Honor, is that they were in the conspiracy after the guidelines changed and, therefore, were sentenced at a much higher level because of that.

THE COURT: Okay. I interrupted you. I apologize.

MR. GRIESS: That's all right. Thank you, Your [36] Honor.

The last point I was making, I'm sure the Court heard me, was with regard to the profit. I think the fact that he made 30 to 40 thousand dollars of ill-gotten gain in this case is a significant factor when the Court looks at seriousness of this particular offense.

THE COURT: Where is that in the evidence? I mean, I'm not disputing you. I saw a figure referred to of $85,000 that Rinderknecht got delivered to him. I didn't see any other figure. Was there another figure in the report?

MR. GRIESS: Indeed, Your Honor. If I could just have one moment.

THE COURT: Okay.

MR. GRIESS: It's paragraph 32.

THE COURT: Okay.

MR. GRIESS: Which indicates that Harbison estimates that Gall made approximately 40,000 from selling Ecstasy. I say 30 to 40 because Mr. Gall, in paragraph 30, indicated $30,000—

THE COURT: Okay.

MR. GRIESS:—was the appropriate amount.

THE COURT: So Harbison estimated Gall made approximately $40,000 is what 32 says.

MR. GRIESS: Correct. And, like I said, Mr. Gall said 30,000, and that's why I mentioned to the Court 30 to 40 [37] thousand.

THE COURT: Right.

MR. GRIESS: The $85,000 figure would have represented cost, not profit, and, obviously, what Mr. Rinderknecht would have then taken his profit out of and passed along the price to his supplier, which was Mr. Morataya.

I think there is a question of deterrence in this case. I think that other individuals need to know that you cannot sell significant quantities and make significant profits from MDMA or Ecstasy, even for a short period of time, and escape accountability for those crimes.

The last thing I think I want to talk about goes to sentencing disparity, Your Honor. Obviously, the Court is cognizant of that and wants to avoid any unwarranted sentencing disparities.

Last Friday, before Judge Gritzner, another co-defendant in this case was sentenced. His name is Jarod Yoder, and I believe that those present very similar circumstances to the Court in terms of the relative involvement.

Mr. Yoder, pursuant to the plea agreement and as corroborated by the presentence report—these are all matters, Your Honor, that were discussed in open court—was responsible for 5,000 pills or 1,250 grams of a mixture and substance containing MDMA, which, because he was involved after the[38] guideline range equivalents—or is the equivalent of a Level 28 quantity of drugs. Yoder was ultimately sentenced to a 36-month term of imprisonment.

Mr. Gall was represented as responsible in this case for a larger quantity, in fact, double the quantity of pills, 10,000 pills, but because his involvement stopped—and I think he does get credit, he is getting credit for the fact that he voluntarily withdrew, and the biggest credit is the fact that he doesn't have to deal with the higher guideline figure—he's responsible only at a Level 24, four levels lower, even though he's about double the amount of pills.

Both Yoder and Gall were receiving Ecstasy from Rinderknecht—Yoder was in Minnesota at the time; Mr. Gall was in Iowa, of course—and they were redistributing it for profit. In terms of differences between their cases, as I said, Yoder was a smaller quantity of pills but a longer period of time. It wasn't quite as short a period of time. I think his last involvement was March of 2002. I think the start times were similar, but, again, it was more sporadic and drawn out, and he, obviously, paid the consequences for that.

Again, other differences are the fact that Gall did withdraw. There is a criminal history difference. Mr. Yoder did not receive the safety valve. He had two convictions for possession of marijuana, and that is all. Unlike Mr. Gall, though, he did not receive a deferred judgment on one of those, [39] and so those counted. He was Criminal History Category II and did not receive the benefit of the safety valve.

THE COURT: How did he get to 36? Did he substantially assist?

MR. GRIESS: No. No, Your Honor.

THE COURT: Okay. How did he get to 36? If there was a mandatory minimum, I'm assuming, because you're talking about safety valve, then he must have done something. How did he get below the mandatory minimum?

MR. GRIESS: There is no mandatory minimum, just like there isn't in this case.

THE COURT: Oh, okay.

MR. GRIESS: In that case, the safety valve doesn't operate to get you below a mandatory minimum, but you do receive the benefit, like Mr. Gall's getting here today, of a two-level reduction.

THE COURT: Okay.

MR. GRIESS: So essentially, he was at a Level 28, received two—three levels off for acceptance of responsibility, and then a Criminal History Category II. That was the sentence he received, 36 months' imprisonment.

That is not 36 months—The Court then, Judge Gritzner, evaluated, as this Court will do under the statute, and determined that 36-month sentence was appropriate under the circumstances

[40] THE COURT: Okay. All right.

MR. GRIESS: But just in terms of pure comparison, that I think their relative contact, their age—in fact, Mr. Yoder was a little bit younger than Mr. Gall—at the time of his sentencing Yoder was gainfully employed—he was an underwriter at a credit organization, his employer is holding his job open—no pretrial release violations, no involvement whatsoever in criminal conduct or specifically this conspiracy since March of 2002. So I think those situations are very, very similar, and he received a 36-month sentence.

For all of those factors, Your Honor, I think that a sentence at the low end of the guideline range in this case or to 30 months is appropriate to address all the factors pursuant to Title 18, United States Code, Section 3553(e)—or 3553, as well as the other factors the Court will take into consideration in sentencing the defendant.

Unless the Court has any questions, that's it.

THE COURT: I do. Mr. Griess, as a legal matter, I saw an opinion the other day, and I didn't probably read the opinion as well as I should have, but the Judge—I think it was one of the districts in Florida, the Judge said he was—this is probably unfair characterization—he was critical of the Government for always standing on the guideline, guideline, guideline on the theory that that's not the law anymore.

It is the law that we have to consult and seriously [41] consider the guidelines, but the recommended sentence doesn't always have to be the guideline. Are you suggesting here that the appropriate sentence is the guideline here?

MR. GRIESS: Yes.

THE COURT: Okay.

MR. GRIESS: I absolutely acknowledge, as I have before this Court in the past, that the Court is not bound by the guidelines.

THE COURT: No, no, no. I know that. But have you ever recommended anything other than—And it may be the policy, and I guess that's what I need to know. Have you ever recommended anything to a sentencing Judge in the Southern District of Iowa except a guideline sentence?

MR. GRIESS: I haven't, Your Honor.

THE COURT: All right.

MR. GRIESS: But I want to be clear to the Court, if I could, that that's not—that's not out of some blind following

of a policy. It's because I personally believe that the guidelines are appropriate and should be followed.

THE COURT: Well, you always know the factual record very well, Mr. Griess, so I'm sure that that's an honestly arrived at answer.

MR. GRIESS: Thank you.

THE COURT: Mr. Gall, before you make your statement of allocution, I wanted to tell you that I received and have [42] read letters from Tina Plett Kalanoff (phonetic)—I'm probably mispronouncing it—and from Christopher Shawn King and from Eric Kellina, and as well I also got letters, and I read them, before today from your aunt, Cheryl Meyer; Mr. Waddell, who signs it as the Pella sales manager.

And then I got a letter from Michael McKenna and Jennifer McKenna, and I got a letter from Fred Novy—Kelli, that's N-o-v-y—and a letter from Kerri Hanna, who I believe from the report is your sister. And then I got a letter from Mark Anderson, who describes himself as the retail replacement sales manager for Pella windows and doors.

I got a letter from Michael Glick in Solon, Iowa; and a letter—a letter signed by Glen and Bernie Leach from Davenport; and a letter from Deb Lamp and another letter from Debra Stillwell and a nice letter from your mother and a letter from Michael Meyer and another letter from your father a letter from your father; a letter from Amy Plett, P-l-e-t-t, who I believe is your girlfriend, if I read the report right; and then I also got a letter from Laura Meyer.

So, Mr. Gall, you have a right of allocution, which every defendant does before sentence is pronounced. It's supposed to be as much for the sentencing Judge as it is you, so if you have anything to say or you want to say, you may do so.

THE DEFENDANT: Do you want me to stand up?

[43] THE COURT: Yes. I can probably hear you better. As long as the reporter and I can hear you, and if I can't hear you, I'll tell you.

THE DEFENDANT: All right.

MR. MILAVITZ: Your Honor, before Mr. Gall exercises his right to allocution, I'd like to— Am I allowed to comment on anything that Mr. Griess said?

THE COURT: Okay.

MR. MILAVITZ: Thank you very much.

I just have a very brief comment. I believe that according to the discovery that I read, and I may be wrong about this, and I just asked Mr. Gall, but he did confirm it, and I don't know if Mr. Griess is aware of this or not, but the two people that Mr. Griess compared Mr. Gall to, Mr. Gooding and Mr. Harbison, who he said were in the conspiracy for, I believe, shorter amounts of time, it's my understanding from—talking to Mr. Gall that they were involved in the conspiracy while Mr. Gall was and then continued to remain in the conspiracy after Mr. Gall withdrew.

So that—And that is my recollection too. I believe they were much smaller quantities as far as sellers. I believe that Mr. Gall was selling to them and then they were reselling, but I believe that is my recollection. And I may be incorrect, but that's what I believe is the case.

THE COURT: Mr. Gall?

[44] THE DEFENDANT:I first want to let you know that I was young and stupid when I committed this crime, and at that time my knowledge of the crime—I was lacking knowledge of how serious the crime was, and I'm willing to take full responsibility of the choices that I made.

I also wanted to let you know that I disengaged from these activities voluntarily. I continued on with my life. I went on

to get a degree from the University of Iowa, moved away from the bad people I was hanging out with, and, of course, as you know, I've started my own business.

As my punishment goes, I am-- I am ready to receive whatever kind of punishment you will give me today, but I want you to keep in mind that there's a lot of people depending on me, including my family, friends, business associates, my employees, my community. My unfinished work, my—the jobs I already have that stretch into August, if I receive a prison sentence today, I will be damaging the relationships that I have with these people.

So I'm asking you for a probation sentence and a chance to prove to you and all these people that I have changed my life and that I am going to continue to strive down the new road that I have created.

THE COURT: Thanks very much.

The record should show—You can be seated, because I'm going to be talking for a while.

[45] Mr. Gall, the lawyers and I necessarily, for the purposes of doing what the Congress and the Courts tell us to do, we have to speak in this language that permits my judgment to be reviewed, as both you and the Government are entitled to have it reviewed under the law, so I speak in terms of guidelines and cases, that sort of thing. It does not detract from the fact that the Judge who sentences a person should know the consequences of sentencing another person.

So oftentimes, in retrospect, it appears that the sentencing Judge is referring to this or that guideline, this or that range, or that sort of thing. It's important that you know that we don't speak this way on purpose, we have to comply with what the law demands of us.

It's the Judge's duty in this case to calculate the guidelines, and I consider it necessary to address the requests that your

lawyer has made to depart from the guideline that Ms. Dassinger, you, and the Government have agreed is the appropriate guideline, given what happened in this case, and so for the purposes of doing that, I adopt what Ms. Dassinger tells me happened in this case in terms of the conduct. I have incorporated into that the stipulation, that is, the agreement between the parties as to what happened in this case.

And, therefore, the total offense level is 19, the criminal history category is I. The Court, under the advisory guidelines, has to consult and seriously consider the total [46] offense level, as well as the criminal history category. The imprisonment range that that yields is 30 to 37 months, a supervised release range of two to three years, and a fine range of 6,000 to a million dollars.

With respect to the aberrant behavior request, the Court is unable to grant such a request under the advisory guidelines. The aberrant behavior contemplated, in my view, by the guidelines is, as the Government pointed out, an act that is of limited duration. It seems to me the activity described in the report, as well as the stipulation, make the aberrant behavior not grounds for departure.

Likewise, what counsel described as a super-acceptance of responsibility is denied. The defendant's already given credit by the guideline for acceptance, and it's reflected in the report.

Likewise, the Court denies a request for a departure based upon remorse or post-offense rehabilitation or for voluntary cessation of criminal activity before it was discovered by the Government. I think the better way to address these matters is within the confines of the statute, which I'm going to do.

Mr. Gall, the statute is 3553(a), and so while I've considered the guidelines, the Court is going to give a sentence other than that contemplated by the guidelines in

this case, and I'm going to be reading this into the record for [47] purposes of the parties, as well as the Court of Appeals.

As required by 18 United States Code 3553(a), in imposing the following sentence, the Court has considered the nature and circumstances of the present offense, along with the characteristics of this defendant. In addition, the Court has reflected upon the seriousness of the offense, the need for adequate deterrence, the protection of the public from further crimes by this defendant, the need for the defendant's rehabilitation, the types of sentences available, the suggested sentencing range outlined in the United States Sentencing Guidelines, along with pertinent policy statements.

The Court also continues to heed the admonition of United States Code 3582(a) that expressly recognizes that, quote, imprisonment is not an appropriate means of promoting correction and rehabilitation, end of quote.

On March 2nd, 2005, the defendant pleaded guilty to one count of conspiracy to distribute MDMA under 21 U.S.C. 846 841(b)(1)(C), a Class C felony. See the plea agreement at page 1.

The Court in particular has taken into account the defendant's voluntary and explicit withdrawal from the conspiracy in September of 2000; the defendant's exemplary behavior while on bond; the support manifested by family and friends who have attested to the defendant's character; the lack of criminal history, especially a complete lack of any [48] violent criminal history; the immaturity of the defendant.

This factor is not an inconsequential consideration. Recent studies on the development of the human brain conclude that human brain development may not become complete until the age of 25. See Elizabeth Williamson, "Brain Immaturity Could Explain Teen Crash Rate," Washington Post, page A01, February 1st, 2005, summarizing a recent National Institutes of Health study that suggests, and quote, that the

critical region of the brain that inhibits risky behavior is not fully formed until age 25, end of quote.

This is of critical importance in the area of criminal law. The Sentencing Commission, in its studies, has deduced that recidivism rates drop as the age of a defendant increases. See United States versus Nellum, 2005 Westlaw, 300073, February 3rd, 2005, Northern District of Indiana.

The Supreme Court of the United States based its most recent death penalty decision, Roper versus Simmons, on studies indicating adolescents are less culpable than adults for their actions. See 125 Supreme Court 1183 at 1195, 2005, stating that, quote, as any parent knows, and as the scientific and sociological studies respondent and his amici cite tend to confirm, quote, a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and [49] decisions, end of quote.

It has also been noted that, quote, adolescents are overrepresented statistically in virtually every category of reckless behavior, citing Arnett, "Reckless Behavior in Adolescence: A Developmental Perspective," 12 Developmental Review 339, 1992.

While the Roper versus Simmons Court held the imposition of the death penalty is unconstitutional for those people who committed the death-eligible crime before the age of 18, the recent National Institutes of Health report confirms that there is no bold line demarcating at what age full maturity is reached.

While age does not excuse behavior, a sentencing court should account for age in discovering the overall characteristics of the defendant, particularly at the time he engaged in the conspiracy in this instance from March of 2000 through September of 2000.

Since the time of the offense conduct, the defendant has graduated from the University of Iowa with a degree in computer science. The defendant owns and operates BMG Construction Service, a company principally devoted to subcontracting for the installation of Pella windows and doors.

Representatives of the Pella Corporation have also written to the Court describing the defendant as, quote, reliable, honest, friendly, and polite, end of quote, with a, [49] quote, superior work ethic and a valuable resource, end of quote.

Soon the defendant's company will begin a significant construction project, the replacement of windows and doors at Northwestern University in Evanston, Illinois.

The Court can only conclude from the defendant's post-offense conduct that he has, in fact, learned from his experience with the United States criminal justice system and has admirably moved to secure a better future for himself.

The Court, however, is bound to impose a sentence that reflects the seriousness of joining a conspiracy to distribute MDMA or Ecstasy. This can best be accomplished in this case by a term of probation for three years with appropriate conditions. Under 18 United States Code 3561(a), it allows the Court to grant probation for offenses other than a Class A or Class B felony.

The Court reminds the defendant that, quote, probation, however, is not an act of leniency. Probation is a substantial restriction of freedom. It is not forgiveness, and it is not endorsement of the offense. See State versus Peckenschneider, 236 Northwestern Second 344 at 353.

The Sentencing Guidelines in the introductory comment to Part B, quote, Probation, state that, quote, probation may be used as an alternative to incarceration provided that the terms and conditions of probation can be fashioned so as to [51]

meet fully the statutory purposes of sentencing, including promoting respect for the law, providing just punishment for the offense, achieving general deterrence, and protecting the public from further crimes by the defendant, end of quote.

The Court recognizes that according to the Sentencing Guidelines, probation is not recommended when, as in this case, the guideline range falls outside of Zone A. This is because the offense level in this case, based solely upon the drug quantity, as the lawyers have pointed out, subjects the defendant to a final offense level of 19.

Other courts have recognized, however, that for a variety of reasons, the guideline calculations based on drug amount may overrepresent the offense conduct. See United States versus Smith, 359 Fed. Supp. 2d 771 at 776, Eastern District of Wisconsin, 2005, noting that the defendant's offense conduct would have been reduced by six levels if he was responsible for powder instead of crack cocaine.

See also United States versus Nellum, cited earlier in my colloquy, describing the system of drug quantities as random as it plays out in reality.

See also United States versus Huerta-Rodriguez, 35 Fed. Supp. 2d 1019 at 1026, Footnote 6. Judge Batillon states, quote, the quantity system was developed to punish—was developed to punish bigger distributors more harshly, but the practice of charging conspiracies over a long period of time [52] has the result of aggregating many small distributions so as make a long-term small-quantity distributor look like a large-quantity distributor.

While not denigrating the seriousness of the offense conduct in this case, the Court finds the offense level based solely upon drug quantity does not adequately reflect the offense conduct.

Nevertheless, under the statutory mandates of 3553(a), the Court finds that the circumstances of the offense and the character of the defendant as described by the Court in this colloquy warrants a sentence of probation.

18 United States Code 3563(b) authorizes the Court to provide, along with the mandatory provisions of probation, discretionary conditions in keeping with factors set forth in 3553 (a) (1) and (a) (2) .

Accordingly, the Court also provides these conditions of probation: You shall participate in a program of testing and treatment for substance abuse as directed by the probation office until such time as you are released from the program by the probation office;

Two, you shall not use alcohol and/or other intoxicants during and after the course of treatment;

Three, you shall submit to a mental health evaluation and participate in treatment if recommended, which may include compliance with any medical regime recommended by treatment [53] personnel as directed by the probation office;

Four, you shall not patronize business establishments where more than 50 percent of the revenue is derived from the sale of alcoholic beverages;

Five, you shall work only in employment approved by the U.S. Probation Office. You shall consult the U.S. Probation Officer prior to any changes in employment. You shall not terminate any employment without prior approval of the probation office.

Mr. Gall, your conduct from about age 16 through the time you withdrew from this conspiracy indicates a lot of addictive behavior. Your blood alcohol was .39 in the accident. I assume you were lucky to have escaped injury. You better get some medical treatment that recognizes you apparently have a disease.

Most of us have no insight into our mental health or addictive behavior, so the only thing that I wish you would have done between your withdrawal from the conspiracy and now is to get some help. I think you have an addiction problem. Looking at this record, I think any objective observer would have to agree with that.

In addition, if you've not yet done so already, Mr. Gall, you should pay $100 to the clerk's office on behalf of the crime victims fund. Based upon what Ms. Dassinger and your lawyer tell me is your financial condition, there's not [54] going to be any further fine or penalty due based upon what deem right now is your inability to pay.

Counsel, do you have anything further before I advise the defendant of his constitutional right of appeal?

MR. GRIESS: No, Your Honor.

MR. MILAVITZ: Your Honor, the only issue that I have is I assume the standard terms and conditions of probation also apply along with—

THE COURT: You should review those with your client, counsel. That will be in the judgment and commitment order.

MR. MILAVITZ: Okay. I'm not— And excuse my ignorance, but I'm not familiar with the standard terms and conditions in this District, but, however, in the District of Colorado, typically one cannot leave the state without permission by the probation officer or the Court, and what Im going to ask the Court—

THE COURT: That's number one in our standard conditions. I'll have my law clerk give them to you so you can review them with the defendant.

MR. MILAVITZ: I will ask the Court— As noted in the presentence report and also in the questions to Mr. Gall's parents or—I believe somewhere, maybe to me, Mr. Gall is

part-owner of a vacation home in Lake of the Ozarks in Missouri.

I will ask the Court—He's got a vacation planned [55] for this weekend, basically, and I would ask the Court to allow him to travel to that vacation home for this weekend, if that's possible. He's already talked to his probation officer or his pretrial release officer, and I believe their response to him was that's fine, but he needs the Court's permission.

THE COURT: Okay. You should talk to the people in supervision yet today, Mr. Gall. It's not a problem for me, but you should talk to people in supervision. Ms. Wilson is our supervisor. Ms. Dassinger can put you in touch with her immediately.

THE DEFENDANT: Okay.

THE COURT: Anything else?

MR. MILAVITZ: Thank you very much, Your Honor.

THE COURT: Mr. Gall, this is a final judgment of the District Court. You and the Government have an opportunity to appeal my judgment to the Court of Appeals if you believe the sentence is illegal or unreasonable. If you or the Government want to take that appeal, you have to file a written notice with the clerk of court within ten days of the entry of today's judgment. You have to serve a copy on the United States Attorney's Office.

The law further requires that I tell you that if you do want to take an appeal from the judgment and commitment order, you have to show me you are unable to afford a lawyer, and I have to appoint a lawyer to represent you on the appeal.

[56] Mr. Gall, do you have any questions about your judgment and commitment order here today or about your constitutional right of appeal?

THE DEFENDANT: No, Your Honor.

THE COURT: We'll be in recess.

(Proceedings concluded at 2:55 p.m.)

CERTIFICATE

I, the undersigned, a Certified Shorthand Reporter of the State of Iowa, do hereby certify that I acted as the official court reporter at the hearing in the above-entitled matter at the time and place indicated.

That I took in shorthand all of the proceedings had at the said time and place and that said shorthand notes were reduced to typewriting under my direction and supervision, and that the foregoing typewritten pages are a full and complete transcript of the shorthand notes so taken.

Dated at Des Moines, Iowa, this 3rd day of June, 2005.

/s/ Kelly M. Mulcahy

CERTIFIED SHORTHAND REPORTER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

Case Number: 04-116
USM Number: 07160-030

UNITED STATES OF AMERICA

v.

BRIAN MICHAEL GALL

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT:

☒ pleaded guilty to count(s) One

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court. _____

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21:846, 841(b)(1)(C)	Conspiracy to Distribute MDMA	10/30/02	One

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) ___

☐ Count(s)_____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

May 27, 2005
Date of Imposition of Judgment

/s/: Robert W. Pratt
Signature of Judge

Robert W. Pratt, U.S. District Judge
Name and Title of Judge

May 27, 2005
Date

PROBATION

The defendant is hereby sentenced to probation for a term of:
36 months

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of placement on probation and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check, if applicable.)

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of probation that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;

2. the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. the defendant shall support his or her dependents and meet other family responsibilities;

5. the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11. the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to

confirm the defendant's compliance with such notification re-quirement.

SPECIAL CONDITIONS OF SUPERVISION

You shall participate in a program of testing and treatment for substance abuse, as directed by the Probation Officer, until such time as you are released from the program by the Probation Office. You shall not use alcohol and/or other intoxicants during and after the course of treatment.

You shall submit to a mental health evaluation and participate in treatment, if recommended, which may include compliance with any medical regime recommended by treatment personnel, as directed by the Probation Officer.

You shall not patronize business establishments where more than fifty percent of the revenue is derived from the sale of alcoholic beverages.

You shall work only at employment approved by the U.S. Probation Office. You shall consult the U.S. Probation Office prior to any changes in employment. You shall not terminate any employment without prior approval from the U.S. Probation Office.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100	$	$

☐ The determination of restitution is deferred until ____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS $_____ $_____

☐ Restitution amount ordered pursuant to plea agreement $_____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the
☐ fine ☐ restitution.

☐ the interest requirement for the
☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses

committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☒ Lump sum payment of $ 100.00 due immediately, balance due
☐ not later than _____, or
☒ in accordance ☐ C, ☐ D, ☐ E, or ☒ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

All criminal monetary penalty payments are to be made to the Clerk's Office, U.S. District Court, P.O. Box 9344, Des Moines, Iowa 50306-9344.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal mone-

tary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

STATEMENT OF REASONS
(Not for Public Disclosure)

☒ THE COURT ADOPTS THE PRESENTENCE REPORT AND GUIDELINE APPLICATIONS WITHOUT CHANGE

OR

☐ THE COURT ADOPTS THE PRESENTENCE REPORT AND GUIDELINE APPLICATIONS BUT WITH THESE CHANGES: (Use Page 3, if necessary.)

☐ Chapter Two of the U.S.S.G. Manual determinations by court (including changes to base offense level or specific offense characteristics):

☐ Chapter Three of the U.S.S.G. Manual adjustment determinations by court (including changes to victim-related adjustments, role in the offense, obstruction of justice, multiple counts, or acceptance of responsibility);

☐ Chapter Four of the U.S.S.G. Manual determinations by court (including changes to criminal history category or scores, career offender, or criminal livelihood determinations):

☐ THE COURT ADOPTS THE PRESENTENCE REPORT WITH THESE COMMENTS OR FINDINGS (including comments or factual findings concerning certain information in the presentence report that the Federal Bureau of Prisons may rely on when it makes inmate classification, designation, or programming decisions. Specify court comments or findings, including paragraphs in the presentence report.) (Use Page 3, if necessary.)

GUIDELINE RANGE DETERMINED BY THE COURT (BEFORE DEPARTURES):

Total Offense Level: 19

Criminal History Category: I

Imprisonment Range: 30 to 37 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 6,000 to $ 1,000,000

☒ Fine waived or below the guideline range because of inability to pay.

☐ THE SENTENCE IS WITHIN THE GUIDELINE RANGE, THAT RANGE DOES NOT EXCEED 24 MONTHS, AND THE COURT FINDS NO REASON TO DEPART.

OR

☐ THE SENTENCE IS WITHIN A GUIDELINE RANGE, THAT RANGE EXCEEDS 24 MONTHS, AND THE SPECIFIC SENTENCE IS IMPOSED FOR THESE REASONS: (Use Page 3, if necessary.)

STATEMENT OF REASONS
(Not for Public Disclosure)

RESTITUTION DETERMINATIONS

Total Amount of Restitution: _____

☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because the number of victims is so large as to make restitution impracticable under 18 U.S.C. § 3663A(c)(3)(A).

☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because determining of fact and relating them to the cause or amount of the victims' losses would complicate or prolong the sentencing process to a to provide restitution to any victim would be outweighed by the burden on the sentencing process under 18 U.S.C. § 3663A(c)(3)(B).

☐ For other offenses for which restitution is authorized under 18 U.S.C. § 3663 and/or required by the sentencing guidelines, restitution ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order to provide restitution to any victims under 18 U.S.C. § 3663(a)(1)(B)(ii).

☐ Restitution is not ordered for other reasons:

☐ Partial restitution is ordered under 18 U.S.C. § 3663(c) for these reasons:

DEPARTURE (Check all that apply)

☒ The sentence departs below the guideline range for the following reasons; or

☐ The sentence departs above the guideline range for the following reasons:

Pursuant to a Plea Agreement

- ☐ based on 5K1.1 motion of the government based on the defendant's substantial assistance;
- ☐ based on a government motion pursuant to an early disposition program;
- ☐ based on a binding plea agreement for departure which the court has accepted (cite below reason, if applicable);
- ☐ based on a plea agreement which cites the below reason for departure, which the court finds to be justified; or
- ☐ based on a plea agreement which states that the government will not oppose a defense departure motion and cites the below reason.

Pursuant to a Motion Not Addressed in a Plea Agreement

- ☐ pursuant to a 5K1.1 motion of the government based on the defendant's substantial assistance;
- ☐ pursuant to a government motion based on the below reason for departure; or
- ☐ pursuant to a defense motion based on the below reason for departure to which the government has not objected; or
- ☐ pursuant to a defense motion based on the below reason for departure to which the government has objected.

☐ Other than plea agreement or motion by the parties based on the below reason for departure.

Reason(s) for Departure

☐ 4A1.3 Criminal History Adequacy	☐ 5K2.8 Extreme Conduct	☐ 5K2.16 Voluntary Disclosure of Offense
☐ 5K2.0 Aggravating or Mitigating Circumstances (explain):	☐ 5K2.9 Criminal Purpose	☐ 5K2.17 High-Capacity Semiautomatic Firearm
☐ 5K2.1 Death	☐ 5K2.10 Victim's Conduct	☐ 5K2.18 Violent Street Gang
☐ 5K2.2 Physical Injury	☐ 5K2.11 Lesser Harm	☐ 5K2.20 Aberrant Behavior
☐ 5K2.3 Extreme Psychological Injury	☐ 5K2.12 Coercion and Duress	☐ 5K2.21 Dismissed and Uncharged Conduct
☐ 5K2.4 Abduction or Unlawful	☐ 5K2.13 Diminished Capacity	☐ 5K2.22 Age or Health of Sex Offenders
☐ 5K2.5 Property Damage or Loss	☐ 5K2.14 Public Welfare	☐ 5K2.23 Discharged Terms of Imprisonment
☐ 5K2.6 Weapons and Dangerous	☐	☐ 5K3.1 Early Disposition, "fast-track" Program
☐ 5K2.7 Disruption of Government	☐	☐

☐ Other (e.g., 2B1.1 commentary, 5H1.1-5H1.6 or 5H1.11) (explain and state guideline and/or statutory basis). (Use Page 3, if necessary.)

STATEMENT OF REASONS

(Not for Public Disclosure)

ADDITIONAL PRESENTENCE REPORT AND GUIDELINE APPLICATION CHANGES (If necessary.)

SPECIFIC SENTENCE IS IMPOSED FOR THESE REASONS (If necessary.)

The Court determined that, considering all the factors under 18 U.S.C. 3553(a), the Defendant's explicit withdrawal from the conspiracy almost four years before the filing of the Indictment, the Defendant's post-offense conduct, especially obtaining a college degree and the start of his own successful business, the support of family and friends, lack of criminal history, and his age at the time of the offense conduct, all warrant the sentence imposed, which was sufficient, but not greater than necessary to serve the purposes of sentencing.

ADDITIONAL COMMENTS OR FINDINGS CONCERNING INFORMATION IN PRESENTENCE REPORT (If necessary.)

ADDITIONAL REASONS FOR DEPARTING FROM THE GUIDELINE RANGE (If necessary.)

Defendant's Soc. Sec.
484-08-0447

Defendant's Date of
January 6, 1979

Defendant's Residence Address:
825 Walnut Street
Iowa City, Iowa 52240

Defendant's Mailing Address : Same

May 27, 2005
Date of Imposition
of Judgment

/s/: Robert W. Pratt
Signature of Judge

Robert W. Pratt,
U.S. District Judge
Name and Title of Judge

May 27, 2005
Date Signed

UNITED STATES DISTRICT COURT
S.D. IOWA

No. 4:04-CR-116

UNITED STATES OF AMERICA,
Plaintiff,

v.

BRIAN MICHAEL GALL,
Defendant.

June 2, 2005

SENTENCING MEMORANDUM

PRATT, *District Judge.*

I. INTRODUCTION

On May 27, 2005, this Court sentenced the Defendant, Brian Michael Gall to a thirty-six month term of probation. This memorandum sets forth the methodology and reasoning for that sentence.

On March 2, 2005, the Defendant pleaded guilty to one count of conspiracy to distribute MDMA, also known as "ecstacy", a Class C felony. *See* 21 U.S.C. §§ 846, 841(b)(1)(C). In fashioning a sentence that is "sufficient, but not greater than necessary, [the Court must consider] the nature and circumstances of the offense and the history and characteristics of the defendant. . . ." 18 U.S.C. § 3553(a)(1).

Further, the Court must consider the need for the sentence imposed, in that it should: reflect the seriousness of the offense, promote respect for the law, and provide just punishment; afford adequate deterrence to criminal conduct; protect the public from further crimes of the defendant; and provide the defendant with needed educational or vocational training, medical care, or other correctional treatment. 18 U.S.C. § 3553(a)(2). Along with these factors, the Court must determine the kinds of sentences available, including those advised by the Sentencing Commission. 18 U.S.C. §§ 3553(a)(3)-(5); *see United States v. Yahnke*, 395 F.3d 823, 824 (8th Cir.2005) (requiring that a sentencing court "must consult Guidelines and take them into account when sentencing"); *United States v. Mathijssen*, 406 F.3d 496, 498 (8th Cir.2005) (reviewing a district court's interpretations of the Guidelines *de novo*, factual findings for clear error, and the final sentencing determination for reasonableness). The Court must also "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" and assess the need to provide restitution to victims. 18 U.S.C. §§ 3553(a)(6), (7). Finally, because a term of imprisonment is available in this case, the Court must heed the statutory admonition "recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. § 3582(a).

II. DISCUSSION

A. Advisory Guidelines Range

The Presentence Report calculation, which the Court adopts, subjects the Defendant to a total offense level of 24 based on the quantity of 10,000 MDMA tablets stipulated to by the parties. This amount converts to 87.5 kilograms of marijuana. The Defendant, however, received a two-point reduction under U.S.S.G. § 5C1.2 for being "safety valve" eligible. The Defendant also received a three-point adjustment for acceptance of responsibility. Taking these reduc-

tions into account, the final offense level calculation is 19.

The Defendant's criminal history is minimal, falling into criminal history category one ("I"). The Defendant's single criminal history point arises from conduct when, at the age of eighteen, the Defendant paid a fine for failure to zip a gun bag, which lay inside a motor vehicle while on a hunting trip. The Defendant pled guilty to two other infractions, as will be discussed below, but the associated conduct did not earn the Defendant any criminal history points under the Guidelines. Accordingly, the advisory Guidelines sentencing range for this Defendant is between 30 and 37 months.

B. Departure Motions

The Defendant made several motions for downward departures from the Guidelines calculation above based on the Defendant's age, cooperation with the government,[1] remorse, and post-offense rehabilitation. Because these factors are more aptly considered under the statutory factors listed in 18 U.S.C. § 3553(a), they are denied. The Defendant also moves for a downward departure based on acceptance of responsibility. Since he has already received a three-point reduction for acceptance, that motion is also denied. *See* U.S.S.G. § 5K2.0(d) (prohibiting such a departure because it is already taken into account under § 3E1.1). Finally, the Defendant moves for downward departures based on the arguments that the Defendant's offense conduct was aberrant and that the Defendant voluntarily withdrew from the conspiracy well before the Indictment was filed in this case.

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[1] The Government filed no substantial assistance motion in this case. The Government conceded that, while the Defendant was receptive to providing testimony at the trials of co-defendants and other information, since his offense conduct occurred almost four years before the Indictment was filed, whatever information the Defendant could reveal was of little use. Ironically, by the time the Defendant provided information, the individuals he knew about had already confessed or were cooperating themselves.

The Court cannot conclude the Defendant's offense conduct was aberrant behavior and, therefore, declines to downwardly depart on that basis. Under the policy statement, a court may depart downward "if the defendant committed a single criminal occurrence or single criminal transaction that: 1) was committed without significant planning; 2) was of limited duration; and 3) represents a marked deviation by the defendant from an otherwise law-abiding life." U.S.S.G. § 5K2.20. The facts, as stipulated by the parties, show that Defendant's offense conduct involved a conspiracy that lasted for at least seven months and included numerous criminal transactions. Conspiracy, by its very nature, almost completely forecloses a finding of aberrant behavior as a basis for downward departure because it invariably involves a degree of planning and is not, except in rare cases, an act of limited duration.

Neither can the Court find the Defendant's voluntary termination from the conduct prior to law enforcement intervention constitutes a basis for departing downward. The Defendant relies on *United States v. Nunemacher*, 362 F.3d 682, 689 (10th Cir.2004), which allowed a district court to consider downwardly departing for a defendant's voluntary termination of criminal conduct before such conduct was brought to the attention of law enforcement. The Tenth Circuit reasoned that voluntary termination reflected that the criminal conduct was atypical and, therefore, worthy of consideration for a departure, if exceptional. *See id.* at 688 ("[V]oluntary termination of illegal activity and cooperation with law enforcement are already taken into account by an acceptance of responsibility adjustment . . . thus may not serve as a basis for departure unless [they] are present to an exceptional degree.") (citing *United States v. Benally*, 215 F.3d 1068, 1075 (10th Cir.2000)). Voluntary termination likewise comes under consideration in the Eighth Circuit when a defendant's acceptance of responsibility is an issue. *United States v. Card*, 390 F.3d 592, 594 n. 3 (8th Cir.2004)

(relying on a district court's application of U.S.S.G. 3E1.1 n. 1(b) to determine whether a defendant accepted responsibility for his conduct). Here, the Defendant has already received a three-point reduction in his offense level for acceptance and his voluntary termination, after seven months and numerous criminal transactions, cannot be said to be so exceptional as to make his criminal conduct atypical. The Defendant's withdrawal from the conspiracy is better discussed within the confines of 18 U.S.C. § 3553(a).

C. Imposition of Sentence

1. *The Nature and Circumstances of the Offense*

The Defendant is charged with entering and exiting a conspiracy that involved the distribution of MDMA. The overall conspiracy occurred from May, 1996 to on or about October 30, 2002. The Defendant's involvement began with the purchase, for the purpose of distribution, of MDMA in February, 2000. The Defendant's involvement ended in September, 2000. In September, 2000, the Defendant informed a coconspirator that he was getting out of the drug business and wanted nothing more to do with the conspiracy. No other aggravating factors are present. None of the offense conduct involved violence, nor were firearms present. The offense level is derived solely on the basis of drug amounts. The Defendant believed that, up until the Indictment was filed in April, 2004, his criminal conduct was all part of the past.

2. *The Character of the Defendant*

The Defendant's criminal-history conduct has been alluded to and appears to stem from his addictions to drugs and alcohol. Other than the firearm offense discussed above, the Defendant pleaded guilty, at the age of eighteen, to failure to maintain control of his vehicle and was ticketed for underage drinking of alcohol. In March, 2000, contemporaneous with the time of the offense conduct in the present case, the De-

fendant pleaded guilty to possession of marijuana, for which he received a one year deferred judgment. In fact, all of the Defendant's criminal conduct, including the present offense, occurred when he was twenty-one-years old or younger.[2]

To the Defendant's credit, he voluntarily and explicitly withdrew from the conspiracy in September, 2000.[3] In addi-

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[2] Immaturity at the time of the offense conduct is not an inconsequential consideration. Recent studies on the development of the human brain conclude that human brain development may not become complete until the age of twenty-five. *See* Elizabeth Williamson, *Brain Immaturity Could Explain Teen Crash Rate*, Wash. Post, Feb. 1, 2005 at A01 (summarizing a recent National Institutes of Health ("NIH") study that suggests "that the region of the brain that inhibits risky behavior is not fully formed until age 25"). This is of critical importance in the area of criminal law. The Sentencing Commission, in its studies, has deduced that recidivism rates drop as the age of defendants increase. *See United States v. Nellum*, No. 2:04-cr-30-ps, 2005 WL 300073 (N.D.Ind. Feb. 3, 2005). The Supreme Court based its most recent death penalty decision, *Roper v. Simmons*, on studies indicating adolescents are less culpable for their actions than adults. *See* ___ U.S. ___, ___, 125 S.Ct. 1183, 1195, 161 L.Ed.2d 1 (2005) (stating that "as any parent knows and as the scientific and sociological studies respondent and his amici cite tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.' (citations omitted) It has been noted that 'adolescents are overrepresented statistically in virtually every category of reckless behavior.'") (quoting Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Review 339 (1992)). While the *Roper* court held imposition of the death penalty is unconstitutional for those persons who committed the death-eligible crime before the age of eighteen, the recent NIH report confirms that there is no bold line demarcating at what age a person reaches full maturity. While age does not excuse behavior, a sentencing court should account for age when inquiring into the conduct of a defendant.

[3] The Government estimates that the Defendant made between $30,000 and $40,000 during his time in the conspiracy. Like so many facts to be considered when a court imposes a sentence, this fact can be viewed from

tion, the Defendant's post-offense behavior has been exemplary. The Defendant continues to wage a successful battle against drug and alcohol addictions; he has remained sober while on bond under pre-trial and pre-sentence release. After turning his back on the conspiracy, the Defendant earned his bachelor of science degree in computer science from the University of Iowa. The Defendant started, and continues to own and operate BMG Construction Services, which operates as a sub-contracting service for the installation of Pella-brand windows and doors. Representatives of the Pella Corporation have written to the Court describing the Defendant as "reliable, honest, friendly, and polite," with a "superior work ethic . . . and a valuable resource." Soon the Defendant's company will begin a significant construction project, the replacement of windows and doors at Northwestern University in Evanston, Illinois. The Court has also received a small flood of letters from family, friends, and work colleagues attesting to the Defendant's character.

3. *The Need for the Sentence Imposed*

The Court can only conclude from Defendant's post-offense conduct that he has, in fact, learned from his experience with the United States criminal justice system, and has admirably moved to secure a better future for himself. The Court, however, is bound to impose a sentence that reflects the seriousness of joining a conspiracy to distribute MDMA.

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different perspectives. On the one hand, the Defendant should be punished for profiting from a criminal scheme. The Government argues that this can best be met by a sentence near the bottom of the advisory Guidelines sentencing range, i.e., thirty months imprisonment. On the other hand, the Defendant, who is from a working-class family and has few financial resources, decided to turn his back on what, for him, was a highly profitable venture. The Presentence Report, paragraph 72, characterizes the profits as "easy money." The Court can not consider, for the purposes of sentencing, one side of the financial aspect of the offense conduct without considering the other.

This is best accomplished, in this case, by a term of Probation for three years with appropriate conditions. *See* 18 U.S.C. § 3561(a) (allowing for probation for offenses other than Class A or Class B felonies). The Court reminds the Defendant that "probation is not an act of leniency. Probation is a substantial restriction of freedom, it is not forgiveness, and it is not an endorsement of the offense." *State v. Peckenschneider*, 236 N.W.2d 344, 353 (Iowa 1975) (McCormick, J., dissenting). The Defendant will have to comply with strict reporting conditions along with a three-year regime of alcohol and drug testing. He will not be able to change or make decisions about significant circumstances in his life, such as where to live or work, which are prized liberty interests, without first seeking authorization from his Probation Officer or, perhaps, even the Court. Of course, the Defendant always faces the harsh consequences that await if he violates the conditions of his probationary term.[4]

Any term of imprisonment in this case would be counter effective by depriving society of the contributions of the Defendant who, the Court has found, understands the consequences of his criminal conduct and is doing everything in

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[4] Along with the mandatory conditions of probation, the Court also provides the following conditions under 18 U.S.C. § 3563(b), which are in keeping with the factors set forth in §§ 3553(a)(1) and (a)(2): 1) You shall participate in a program of testing and treatment for substance abuse, as directed by the Probation Officer, until such time as you are released from the program by the Probation Office; 2) You shall not use alcohol and/or other intoxicants during and after the course of treatment; 3) You shall submit to a mental health evaluation and participate in treatment, if recommended, which may include compliance with any medical regime recommended by treatment personnel, as directed by the Probation Officer; 4) You shall not patronize business establishments where more than fifty percent of the revenue is derived from the sale of alcoholic beverages; and 5) You shall work only at employment approved by the U.S. Probation Office. You shall consult the U.S. Probation Office prior to any changes in employment. You shall not terminate any employment without prior approval from the U.S. Probation Office.

his power to forge a new life. The Defendant's post-offense conduct indicates neither that he will return to criminal behavior nor that the Defendant is a danger to society. In fact, the Defendant's post-offense conduct was not motivated by a desire to please the Court or any other governmental agency, but was the pre-Indictment product of the Defendant's own desire to lead a better life. Indeed, a sentence of imprisonment may work to promote not respect, but derision, of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing.

III. CONCLUSION

The introductory commentary to Part B-Probation of the Sentencing Guidelines states that: "Probation may be used as an alternative to incarceration, provided that the terms and conditions of probation can be fashioned so as to meet the fully statutory purposes of sentencing, including promoting respect for the law, providing just punishment for the offense, achieving general deterrence, and protecting the public from further crimes by the defendant." The Court recognizes that, according the Sentencing Guidelines, Probation is not recommended when, as in this case, the Guidelines range falls outside of Zone A.[5] Nevertheless, the Court finds that the

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[5] This is because the offense level in this case, based solely on drug quantity, subjects the Defendant to a final offense level of 19. Other courts have recognized, however, that for a variety of reasons, the Guidelines calculations based on drug amount may overrepresent the actual offense conduct. *See United States v. Smith*, 359 F.Supp.2d 771, 776 (E.D. Wis.2005) (noting that defendant's offense level would have been reduced by six levels if he was responsible for powder instead of crack cocaine); *United States v. Nellum*, No. 2:04-cr-30-ps, 2005 WL 300073 at *5 (N.D.Ind. Feb. 3, 2005) (describing the system of drug quantities as random as it is played out in reality); *United States v. Huerta-Rodriguez*, 355 F.Supp.2d 1019, 1026 n. 6 (D.Neb.2005) (stating that "the quantity system was developed to punish bigger distributors more harshly, but practice of charging conspiracies over a long period of time has the result

circumstances of the offense and the character of the Defendant, for the reasons set forth above, warrant a sentence of Probation as being sufficient, but not greater than necessary, to comply with the statutory mandates of 18 U.S.C. § 3553(a).

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of aggregating many small distributions so as to make a long-term small quantity distributor look like a large-quantity distributor"). While not denigrating the seriousness of the crime in the present case, the Court finds the offense level, based solely on drug quantity, does not adequately reflect the offense conduct.

The Government argues that, because the offense level in this case is derived from the 1999 Guidelines and not a subsequent Guidelines, the Defendant already receives a benefit. Because, had the conduct occurred later, the Defendant would be subject to a higher sentencing range. This reasoning stems from harsher Guidelines sentencing ranges in drug trafficking cases based on drug amounts. This is no argument. The "benefit" of the 1999 calculation incurred by the Defendant was the result of his own decision to withdraw from the conspiracy. The Sentencing Commission did not raise the offense level associated with the same drug quantity in order to benefit those who had already committed the crime or to somehow reward them for engaging in earlier criminal conduct, but to reflect Congressional intent to toughen sentences for those involved in drug trafficking.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

Criminal No. 04-116

UNITED STATES OF AMERICA,
Plaintiff,

v.

BRIAN MICHAEL GALL,
Defendant.

NOTICE OF APPEAL

Notice is hereby given that the United States of America, plaintiff in the above named case, hereby appeals to the United States Court of Appeals for the Eighth Circuit, pursuant 18 U.S.C. § 3731, from the judgment (Docket # 200) entered in this case on the 27th day of May, 2005.

Dated: June 24, 2005

Respectfully Submitted,

Matthew G. Whitaker
United States Attorney

By: /s/ _____
Jason T. Griess
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UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 05-3001

UNITED STATES OF AMERICA,
Appellant,

v.

BRIAN MICHAEL GALL,
Appellee.

Submitted: Feb. 14, 2006
Filed: May 12, 2006
Rehearing and Rehearing En Banc Denied July 7, 2006.*

Before LOKEN, *Chief Judge*, BOWMAN and SMITH, *Circuit Judges*.

SMITH, *Circuit Judge*.

Brian Michael Gall pleaded guilty to conspiracy to distribute a mixture and substance containing methylenedioxymethamphetamine ("MDMA"), a Schedule I controlled substance, in violation of 21 U.S.C. §§ 841(b)(1)(C) and 846. The district court imposed a sentence of 36 months' probation and a $100 special assessment. The government appeals the sentence, arguing that it is unreasonable. We conclude that Gall's sentence is unreasonable. Accordingly, we remand the case for resentencing.

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* Judge Steven M. Colloton took no part in the consideration or decision of this matter.

I. *Background*

In February or March 2000, Gall entered into an agreement with Luke Rinderknect and others to distribute MDMA, also known as ecstacy. Initially, Gall purchased 100 ecstasy tablets from Rinderknect on six occasions between February and May 2000. During this period, Gall traveled from Iowa City, Iowa, to Pell, Iowa, to purchase ecstasy from Rinderknect.

In May 2000, Rinderknect decided to move to Burbank, California. Before leaving Iowa, he arranged a meeting with Gall and Theodore Sauerberg to facilitate the ongoing distribution of ecstasy in his absence. During the meeting, the parties agreed that Sauerberg would accept delivery of ecstasy from Rinderknect and transfer the drugs to Gall. When Gall received the drugs from Sauerberg, he distributed them to other individuals, including Ross Harbison, Jason Story, Brooks Robinson, Mark Goodding, and Corey Coleman. After receiving payment from his customers, Gall delivered the drug proceeds to Sauerberg. Sauerberg then delivered the cash to Rinderknect.

One month after the initial meeting in Iowa City, Rinderknect mailed a package containing 5,000 tablets of ecstasy to Sauerberg in Iowa City. Sauerberg then distributed the ecstasy to Gall in 1,000 tablet increments. Pursuant to the agreement, Gall distributed the ecstasy to other individuals, including Coleman who purchased a total of 1,500 to 2,000 tablets. Gall knew his customers were redistributing the drugs within the community. As the drugs were distributed, Gall paid Sauerberg for the ecstasy. After Sauerberg collected the $85,000 purchase price from Gall, he contacted Rinderknect who flew to Iowa and obtained the cash.

Approximately one to two months later, Rinderknect mailed a second package containing 5,000 tablets of ecstasy to Sauerberg in Iowa City. Again, Sauerberg distributed the ecstasy to Gall in 1,000 tablet increments. After distributing

the ecstasy, Gall remitted $85,000 to Sauerberg, who delivered the money to Rinderknect.

In September 2000, Gall decided to leave the drug conspiracy. Rinderknect traveled to Iowa City and met with Gall. Gall told Rinderknect that he was getting out of the drug business over concerns that Sauerberg was telling too many people about their ecstasy distribution business. Rinderknect sold no more ecstasy to Gall as he requested. According to Gall, he stopped selling ecstasy in August 2000 when he moved in with a new roommate and started studying for his major at the University of Iowa. Goodding testified that Gall stopped selling ecstasy in August 2000 because he did not like the trouble of having to deal with people. Gall estimated that he made $30,000 while a member of the ecstasy conspiracy.

After college graduation in 2002, Gall moved to Mesa, Arizona. Federal agents approached Gall in Arizona, requesting to speak with him about his involvement with ecstasy sales while living in Iowa. Unknown to Gall, law enforcement had already arrested Rinderknect and Sauerberg, who had implicated Gall. Gall admitted to the agents his involvement in the conspiracy. In 2004, Gall was charged in an indictment with conspiracy to distribute MDMA. Gall made arrangements to return to Iowa from his home in Winter Park, Colorado, when he learned there was a federal arrest warrant issued for him. Upon his return to Iowa, he turned himself in to federal authorities.

Because Gall withdrew from the conspiracy in September 2000, the parties stipulated that the November 1, 1999 edition of the United States Sentencing Guidelines applied to Gall's offense conduct. The presentence report ("PSR") assigned Gall responsibility for 10,000 tablets of ecstasy. The parties stipulated that for the purpose of calculating a Guidelines sentence, Gall would be held accountable for 2,500 grams of ecstasy, or 10,000 tablets, which under the 1999 Guidelines

equals 87.5 kilograms of marijuana. Pursuant to U.S.S.G. § 2D1.1, 87.5 kilograms of marijuana placed Gall at a base offense level of 24. Because he qualified for the safety valve pursuant to U.S.S.G. § 5C1.2, Gall's offense level was reduced by two levels to 22. An additional three-level reduction for acceptance of responsibility resulted in a total offense level of 19.

Gall's criminal history included a conviction for failure to maintain control of his vehicle and underage alcohol possession in March 1997. As part of his sentence, Gall was ordered to pay a fine and undergo treatment for alcohol abuse. No criminal history points were assessed for this conviction pursuant to U.S.S.G. § 4A1.2(c). Gall was also convicted in December 1997 of improper storage of a firearm on a public highway. This conviction added one criminal history point pursuant to U.S.S.G. § 4A1.1(c). Finally, in March 2000, Gall was convicted of possession of marijuana for which he received a deferred judgment; no criminal history points were assigned to this conviction. With a Category I criminal history, Gall's advisory Guidelines range was 30 to 37 months' imprisonment.

At Gall's sentencing hearing, his father, Tom Gall, testified that he had observed a change in his son's life and that his son had started his own business and was doing well. He added that contractors rely on his son for expertise in installing windows. Finally, he commented that his family would be devastated if his son went to jail.

Gall's mother, Vicki Gall, testified that she believed her son realizes that he made a "stupid mistake" and that he has really learned from it. She added that during the last year, her son has become more mature. She concluded by questioning the value of incarcerating someone who had already made positive changes in his life.

Gall's counsel requested a sentence of probation, asserting that Gall was not in need of rehabilitation because he had

already done an admirable job of rehabilitating himself. His counsel noted letters of support sent to the district court sent by Gall's friends and family. In addition, his counsel argued that a felony conviction is a severe consequence that would follow Gall throughout his life. Gall's counsel distinguished Gall from the codefendants who received prison sentences by noting Gall's withdrawal from the conspiracy and his assumption of a crime-free lifestyle. Counsel concluded his remarks by reminding the court that Gall's family, along with two contract employees, "work pretty much exclusively for Mr. Gall" and were depending on Gall.

The government requested a sentence of 30 months' imprisonment, a sentence at the low end of the advisory Guidelines range. The government argued this sentence was appropriate, considering Gall already received a significant benefit by being sentenced under the 1999 Guidelines. In 1999, the Guidelines stated that 1 gram of ecstasy equated to 35 grams of marijuana. The current Guidelines equate 1 gram of ecstasy to 500 grams of marijuana, which is 14 times the conversion quantity that Gall faced. In addition, Gall's recommended sentence only included drug quantities for the period of his participation in the conspiracy not foreseeable drug quantities during the entire conspiracy. Also, Gall benefitted from a two-level safety-valve reduction. Finally, the government argued that a 30-month sentence was appropriate because the other coconspirators also received prison sentences.

Before announcing its sentence, the district court denied a defense request to depart from the advisory Guidelines range based upon aberrant behavior and extraordinary acceptance of responsibility. The court concluded that departure requests for remorse, post-offense rehabilitation, and voluntary cessation of criminal activity were best considered within the confines of 18 U.S.C. § 3553(a).

After considering the Guidelines, the district court stated, both at the hearing and in its subsequent sentencing memo-

randum, that it was going to impose a sentence other than that contemplated by the Guidelines and sentenced Gall to 36 months' probation. In imposing the sentence of probation, the court stated that it had considered the § 3553(a) factors. Particularly, the court stated that it took into account "the defendant's voluntary and explicit withdrawal from the conspiracy in September of 2000; the defendant's exemplary behavior while on bond; the support manifested by family and friends who have attested to the defendant's character; the lack of criminal history, especially a complete lack of any violent criminal history; and the immaturity of the defendant."

Regarding the nature and circumstances of the offense under § 3553(a)(1), the district court noted that Gall had withdrawn from the conspiracy, the offense did not involve violence or firearms, and the offense level was derived solely on the basis of drug amounts.

As to the character of the defendant, the court stated that all of Gall's criminal conduct, including the present offense, occurred when he was 21 years old or younger, citing the Supreme Court's analysis in *Roper v. Simmons*, 543 U.S. 551, 569, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), that studies indicate that adolescents are less culpable than adults for their actions and "a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." While acknowledging the decision's limited applicability to those who commit a death-eligible crime before the age of 18, the district court concluded that a National Institute of Health Study "confirms there is no bold line demarcating at what age full maturity is reached." Therefore, the court determined that Gall's age at the time of the offense should be considered in "discovering the overall characteristics of the defendant."

In addition, the court noted Gall's "exemplary" post-offense behavior, including earning his college degree and owning his own business. The court referred to the correspondence it had received, which described Gall as "reliable, honest, friendly, and polite" with "superior work ethic and valuable resources." The district court stated that it could "only conclude from the defendant's post-offense conduct that he has, in fact, learned from his experience with the United States criminal justice system and admirably moved to secure a better future for himself."

Finally, under § 3553(a)(2)(A), the court considered the need for the sentence imposed to reflect the seriousness of the offense. The court stated that the best way to accomplish this goal was to impose a term of probation because "[a]ny term of imprisonment in this case would be counter effective by depriving society of the contributions of the Defendant who, the Court has found, understands the consequences of his criminal conduct and is doing everything in his power to forge a new life."

The district court sentenced Gall to a term of 36 months' probation as a reflection of "the seriousness of joining a conspiracy to distribute MDMA or Ecstacy." Recognizing that probation is not recommended when the Guidelines range falls outside of Zone A, the district court concluded that probation was nevertheless appropriate because Gall's offense level was based "solely on drug quantity." The court stated, "While not denigrating the seriousness of the offense conduct in this case, the Court finds the offense level based solely upon drug quantity does not adequately reflect the offense conduct."

The government now appeals, arguing that the sentence is unreasonable in light of all of the § 3553(a) factors because the district court (1) gave unreasonable weight to Gall's withdrawal from the conspiracy; (2) improperly relied on studies showing that adolescents are less culpable for their

actions than adults; (3) gave unreasonable weight to Gall's post-offense rehabilitation and behavior while on pre-trial release; (4) failed to acknowledge that Gall's lack of criminal history was accounted for in the Guidelines calculation; (5) incorrectly concluded that a sentence of probation reflects the seriousness of the offense; (6) did not consider whether a sentence of probation affords adequate deterrence to future criminal conduct; and (7) did not consider whether a sentence of probation creates unwarranted sentencing disparities among defendants with similar records who committed similar crimes.

II. *Discussion*

"Under *Booker*, the sentencing guidelines are no longer a mandatory regime. Instead, the district court must take the advisory guidelines into account together with other sentencing factors enumerated in 18 U.S.C. § 3553(a)." *United States v. Claiborne*, 439 F.3d 479, 480 (8th Cir.2006). To determine the proper sentence, "the district court must first calculate the applicable guidelines sentencing range." *Id.* After calculating the advisory Guidelines range, the district court "may then impose a sentence outside the range in order to 'tailor the sentence in light of the other statutory concerns' in § 3553(a)." *Id.* (quoting *United States v. Booker*, 543 U.S. 220, 245-46, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005)).

In the present case, neither party challenges the district court's determination of the Guidelines sentencing range; therefore, "we review the resulting sentence for reasonableness, a standard akin to our traditional review for abuse of discretion." *Id.* at 481.

"We have determined that a sentence imposed within the guidelines range is presumptively reasonable." *United States v. Myers*, 439 F.3d 415, 417 (8th Cir.2006). "While it does not follow that a sentence outside the guidelines range is unreasonable," a sentence outside of the Guidelines range

"'may be unreasonable if a sentencing court fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper factor or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case.'" *Id.* at 417-18 (quoting *United States v. Haack*, 403 F.3d 997, 1004 (8th Cir.2005)).

The district court must clearly explain why it imposed a sentence outside of the Guidelines range. *United States v. Gatewood*, 438 F.3d 894, 896 (8th Cir.2006). While we do not require "a rote recitation of each § 3553(a) factor," the district court should explain why it varied from the Guidelines and the extent of the variance. *Id.* "'Sentences varying from the guidelines range . . . are reasonable so long as the judge offers appropriate justification under the factors specified in 18 U.S.C. 3553(a). How compelling that justification must be is proportional to the extent of the difference between the advisory range and the sentence imposed.'" *Claiborne*, 439 F.3d. at 481 (quoting *United States v. Johnson*, 427 F.3d 423, 426-27 (7th Cir.2005)). Therefore, "the farther the district court varies from the presumptively reasonable guidelines range, the more compelling the justification based on the § 3553(a) factors must be." *United States v. McMannus*, 436 F.3d 871, 874 (8th Cir.2006).

Here, the district court imposed a sentence of probation when the bottom of Gall's advisory Guidelines range was 30 months' incarceration. In essence, this amounts to a 100% downward variance, as Gall will not serve any prison time. Such a variance is extraordinary. "An extraordinary reduction must be supported by extraordinary circumstances." *United States v. Dalton*, 404 F.3d 1029, 1033 (8th Cir.2005); *see also Claiborne*, 439 F.3d at 481 (holding that the district court's imposition of a 15-month sentence when the Guidelines range was 37 to 46 months' imprisonment, a 60% down-

ward variance, was unreasonable). We conclude that this extraordinary variance is not supported by extraordinary justifications.

First, the district court gave too much weight to Gall's withdrawal from the conspiracy because the court failed to acknowledge the significant benefit Gall received from being subject to the 1999 Guidelines. Gall was held responsible for 10,000 tablets of MDMA at a conversion rate of 1 gram of MDMA to 35 grams of marijuana, resulting in a base offense level of 24. Under the current Guidelines, however, Gall's base offense level would have been 32 because 1 gram of MDMA equates to 500 grams of marijuana. In addition, Gall was not held accountable for quantities of ecstasy distributed by other members of the conspiracy subsequent to his withdrawal. Under U.S.S.G. § 1B1.3, Gall could have been held responsible for other members' reasonably foreseeable acts. *United States v. Smith*, 240 F.3d 732, 737 (8th Cir. 2001) ("A defendant convicted of conspiracy is properly held accountable for all reasonably foreseeable acts and omissions of any co-conspirator taken in furtherance of the con-spiracy.").

Second, the district court gave significant weight to an improper factor when it relied on general studies showing persons under the age of 18 display a lack of maturity, which often results in impetuous and ill-considered actions. This general study, however, does not explain how Gall's specific behavior in the instant case was impetuous or ill-considered. Furthermore, Gall sold ecstacy as a 21-year-old adult, not as an adolescent.

Third, the district court did not properly weigh the seriousness of Gall's offense. While the district court observed that Gall's offense level did not adequately reflect the offense conduct because it was based "solely on drug quantity," the district court ignored the serious health risks ecstasy poses. Ecstasy causes increased body temperature, which can lead to

liver, kidney, and cardiovascular system failure; increases in heart rate and blood pressure; and severe anxiety and depression, which can occur days or weeks after taking ecstasy. *National Institute on Drug Abuse*, (2003), *at* www.nida.nih.gov/infofax/ecstasy.html (last visited March 31, 2006). Gall sold 10,000 ecstasy pills during the time he participated in the drug conspiracy. The potential harm posed by this quantity of illegal drugs should not be lightly discounted.

Fourth, the record does not show that the district court considered whether a sentence of probation would result in unwarranted sentencing disparities. *See* 18 U.S.C. § 3553(a)(6). "Congress has made avoiding unwarranted disparity a legislative priority." *United States v. Lazenby*, 439 F.3d 928, 933 (8th Cir.2006). Therefore, we find that the district court failed to consider a relevant factor that should have received significant weight.

Finally, the district court placed too much emphasis on Gall's post-offense rehabilitation. Even if Gall's rehabilitation "is dramatic and hopefully permanent," a sentence of probation for participating as a middleman in a conspiracy distributing 10,000 tablets of ecstasy with a personal profit of $30,000 "'lies outside the limited range of choice dictated by the facts of the case.'" *Id.* (quoting *Haack*, 403 F.3d at 1004).

III. *Conclusion*

Accordingly, the judgment of the district court is reversed and the case is remanded to the district court for resentencing.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 05-3001

UNITED STATES OF AMERICA,
Appellant,

v.

BRIAN MICHAEL GALL,
Appellee.

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is reversed and the cause is remanded to the district court for proceedings consistent with the opinion of this court.

(5172-010199)

May 12, 2006

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 05-3001

UNITED STATED OF AMERICA,
Appellant,

v.

BRIAN MICHAEL GALL,
Appellee.

Order Denying Petition for Rehearing and
for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. Judge Steven M. Colloton took no part in the consideration or decision of this matter.

(5128-010199)

July 7, 2006

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit